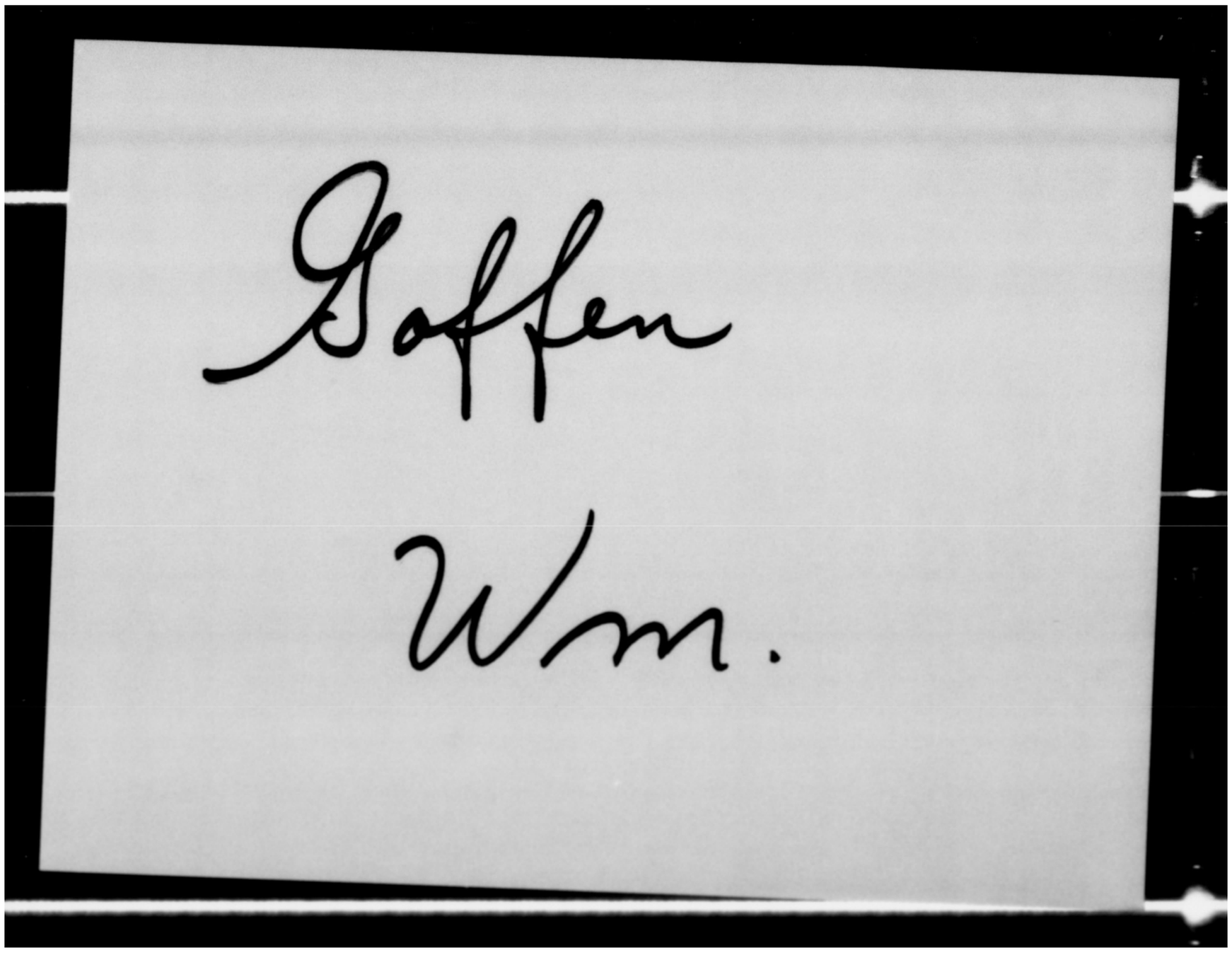
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WILLIAM GOFFEN
COUNSELOR AT LAW

160 BROADWAY. NEW YORK 38. N.Y.

RECTOR 2-9478

July 19th, 1963

Mr. Harold J. Gibbons
25 Louisiana Avenue, N. W.
Washington, D. C.

Dear Mr. Gibbons:

I think you will enjoy reading my article on Abridgments As Infringements.

Sincerely,

WILLIAM GOFFEN

WG:FT
ENC.

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Goffen, William (Atty.)

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Y

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WILLIAM GOFFEN
COUNSELOR AT LAW

160 BROADWAY. NEW YORK 38. N. Y.

January 9, 1963

Mr. Harold Gibbons
25 Louisiana Avenue, N.W.
Washington 1. D.C.

Dear Mr. Gibbons:

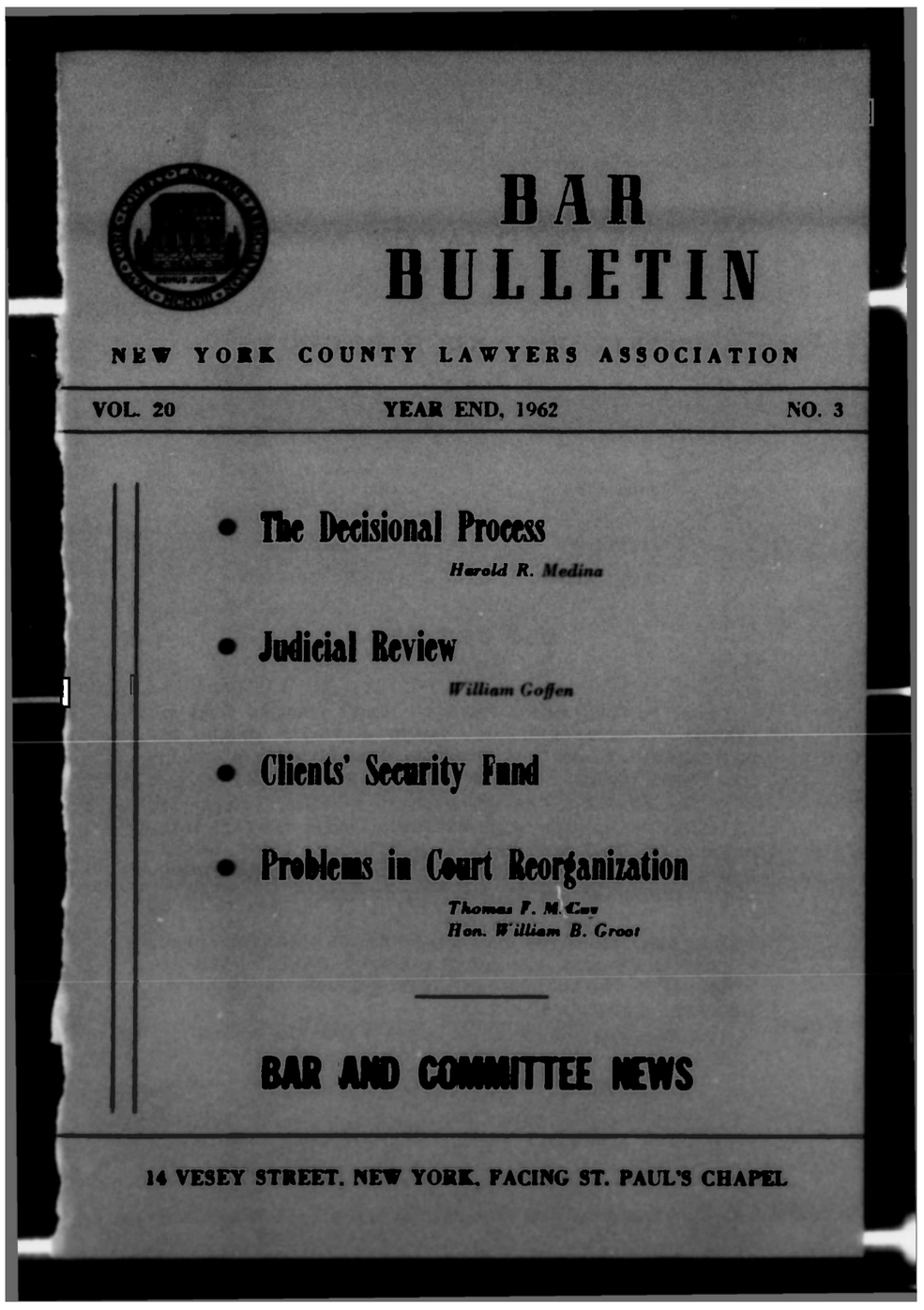
I know you will enjoy my enclosed article on Judicial Review.

Sincerely,

William Goffen

WILLIAM GOFFEN

WG:sn
Enc.


BAR
BULLETIN
NEW YORK COUNTY LAWYERS ASSOCIATION
VOL. 20
YEAR END, 1962
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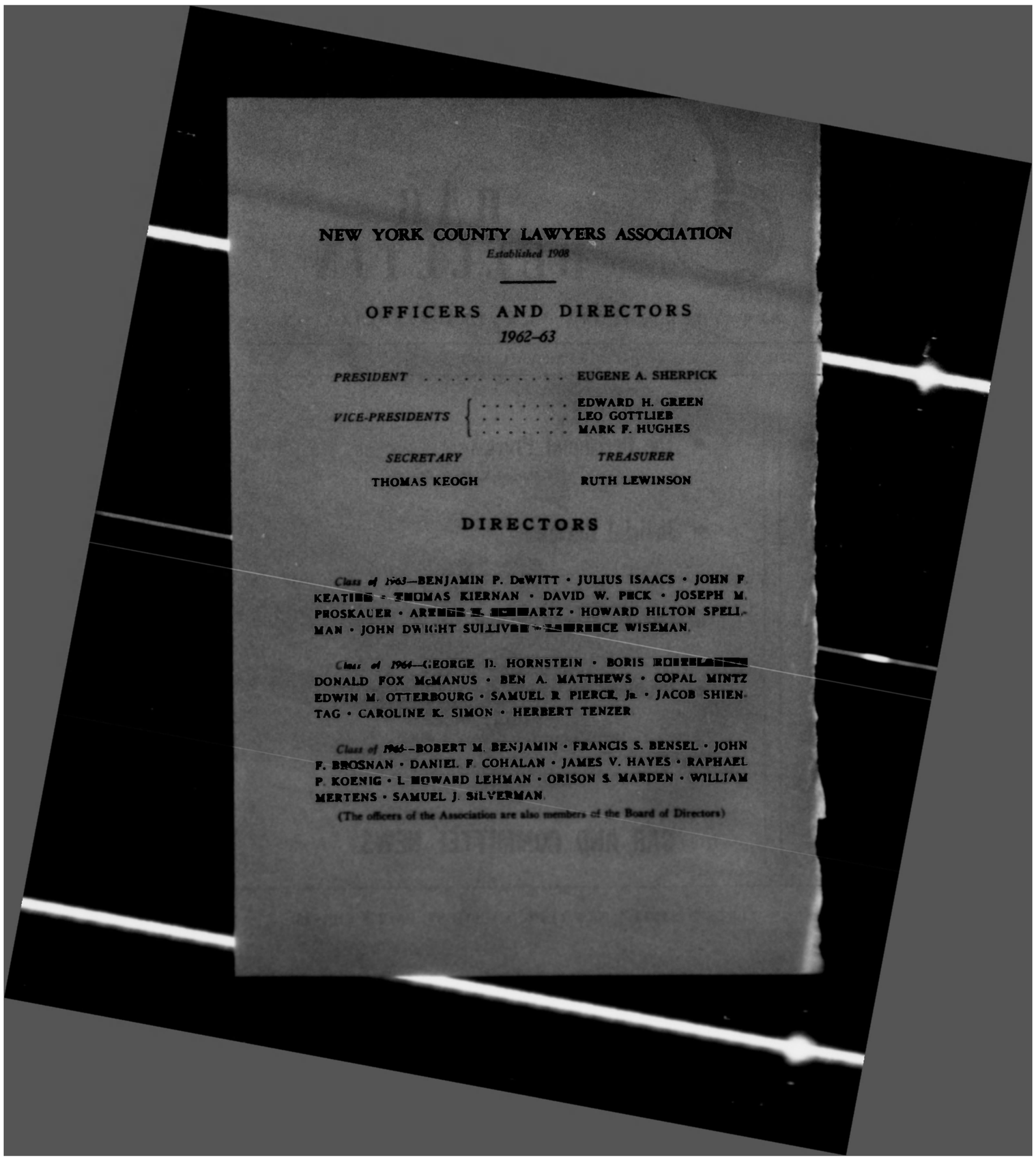
• Judicial Review
William Goffen
• Clients' Security Fund
• Problems in Court Reorganization
Thomas F. McCoy
Hon. William B. Groat
BAR AND COMMITTEE NEWS
14 VESEY STREET, NEW YORK, FACING ST. PAUL'S CHAPEL



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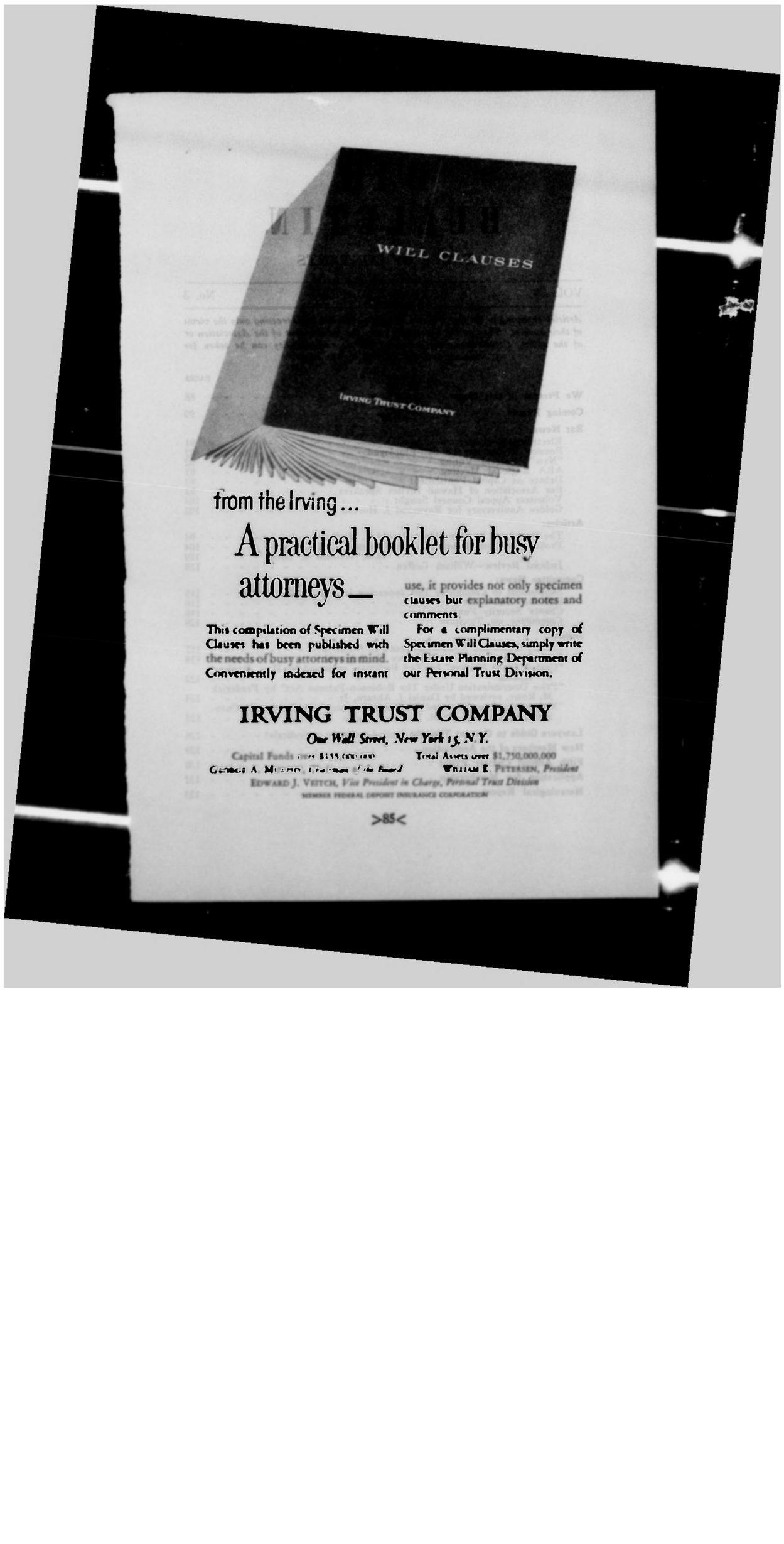
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BAR BULLETIN

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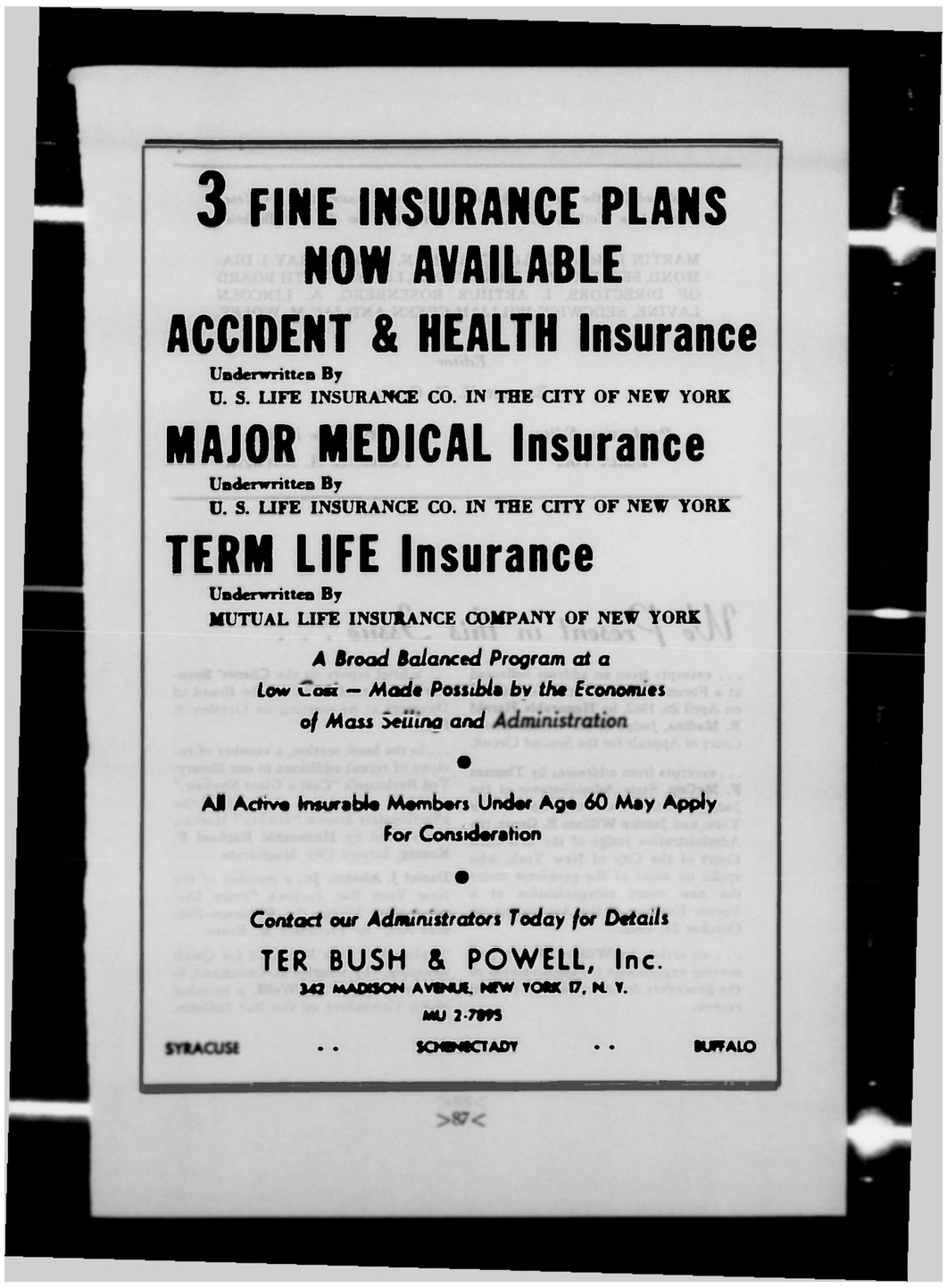
Articles appearing in the Bar Bulletin should be regarded as expressing only the views of their authors. They do not necessarily carry the endorsement of the Association or of the editor. Contributions are welcomed but no responsibility can be taken for manuscripts not solicited by the editor.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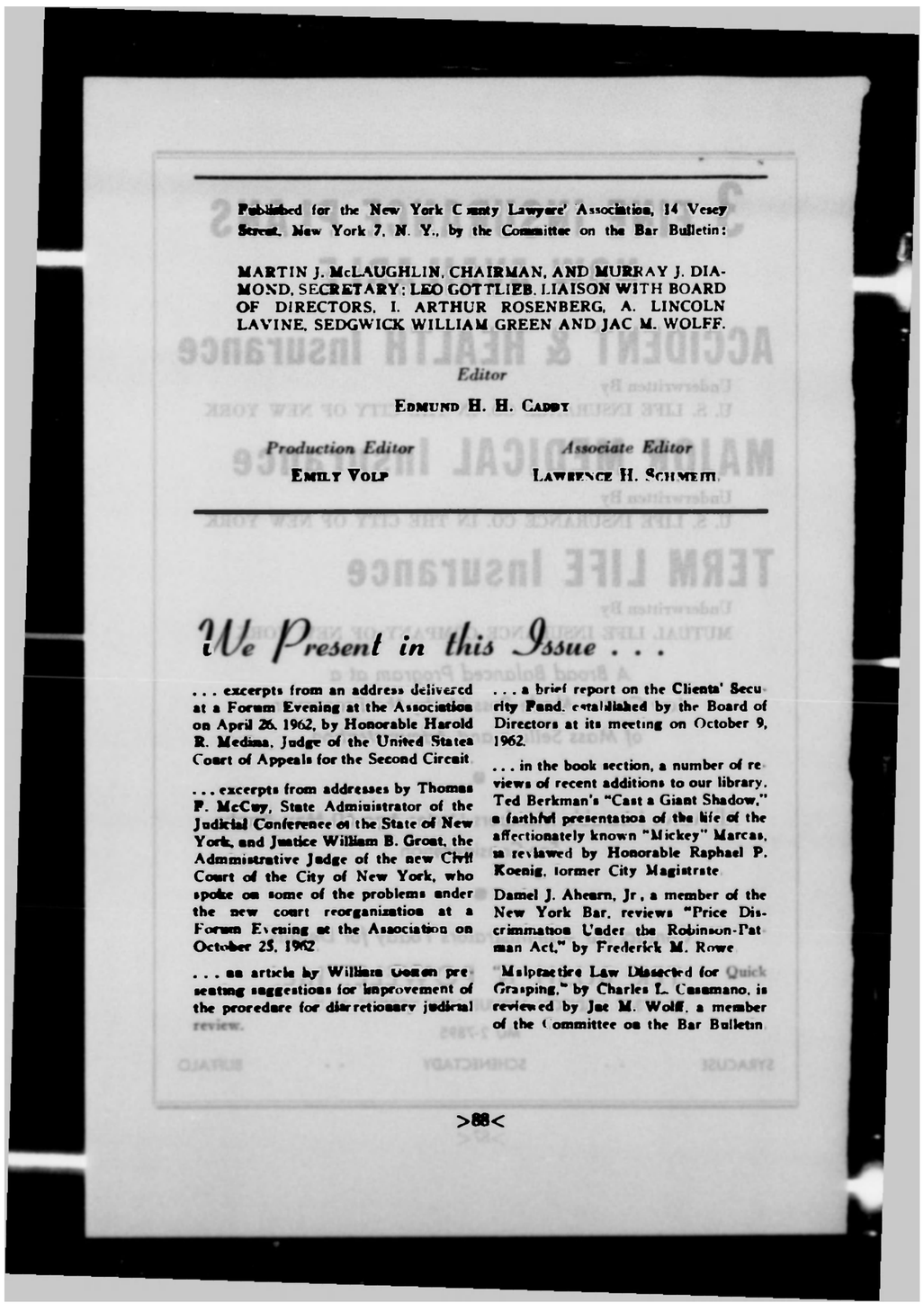

Published for the New York County Lawyers' Association, 14 Vesey Street, New York 7, N. Y., by the Committee on the Bar Bulletin:

MARTIN J. McLAUGHLIN, CHAIRMAN, AND MURRAY J. DIAMOND, SECRETARY; LEO GOTTLIEB, LIAISON WITH BOARD OF DIRECTORS, I. ARTHUR ROSENBERG, A. LINCOLN LAVINE, SEDGWICK WILLIAM GREEN AND JAC M. WOLFF.

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We Present in this Issue . . .

. . . excerpts from an address delivered at a Forum Evening at the Association on April 26, 1962, by Honorable Harold R. Medina, Judge of the United States Court of Appeals for the Second Circuit.

. . . excerpts from addresses by Thomas F. McCoy, State Administrator of the Judicial Conference of the State of New York, and Justice William B. Groat, the Administrative Judge of the new Civil Court of the City of New York, who spoke on some of the problems under the new court reorganization at a Forum Evening at the Association on October 25, 1962.

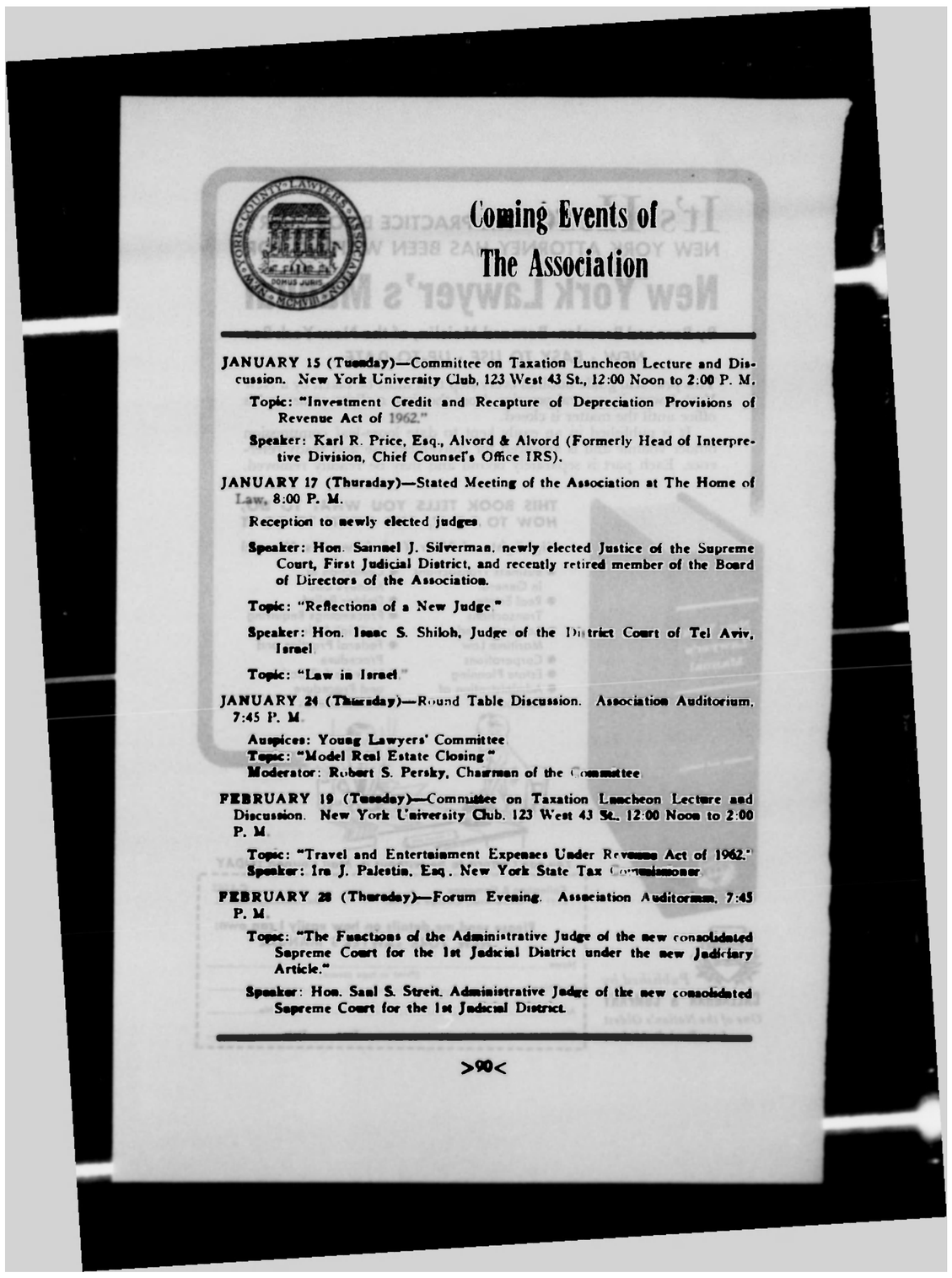
. . . an article by William Cohen presenting suggestions for improvement of the procedure for discretionary judicial review.

. . . a brief report on the Clients' Security Fund, established by the Board of Directors at its meeting on October 9, 1962.

. . . in the book section, a number of reviews of recent additions to our library. Ted Berkman's "Cast a Giant Shadow," a faithful presentation of the life of the affectionately known "Mickey" Marcus, is reviewed by Honorable Raphael P. Koenig, former City Magistrate.

Damel J. Ahearn, Jr., a member of the New York Bar, reviews "Price Discrimination Under the Robinson-Patman Act," by Frederick M. Rowe.

"Malpractice Law Dissected for Quick Grasping," by Charles L. Casamano, is reviewed by Jac M. Wolff, a member of the Committee on the Bar Bulletin.



Coming Events of The Association

JANUARY 15 (Tuesday)—Committee on Taxation Luncheon Lecture and Discussion. New York University Club, 123 West 43 St., 12:00 Noon to 2:00 P. M.

Topic: "Investment Credit and Recapture of Depreciation Provisions of Revenue Act of 1962."

Speaker: Karl R. Price, Esq., Alvord & Alvord (Formerly Head of Interpretive Division, Chief Counsel's Office IRS).

JANUARY 17 (Thuraday)—Stated Meeting of the Association at The Home of Law, 8:00 P. M.

Reception to newly elected judges.

Speaker: Hon. Samuel J. Silverman, newly elected Justice of the Supreme Court, First Judicial District, and recently retired member of the Board of Directors of the Association.

Topic: "Reflections of a New Judge."

Speaker: Hon. Isaac S. Shiloh, Judge of the District Court of Tel Aviv, Israel.

Topic: "Law in Israel."

JANUARY 24 (Thursday)—Round Table Discussion. Association Auditorium, 7:45 P. M.

Auspices: Young Lawyers' Committee.
Topic: "Model Real Estate Closing."
Moderator: Robert S. Persky, Chairman of the Committee.

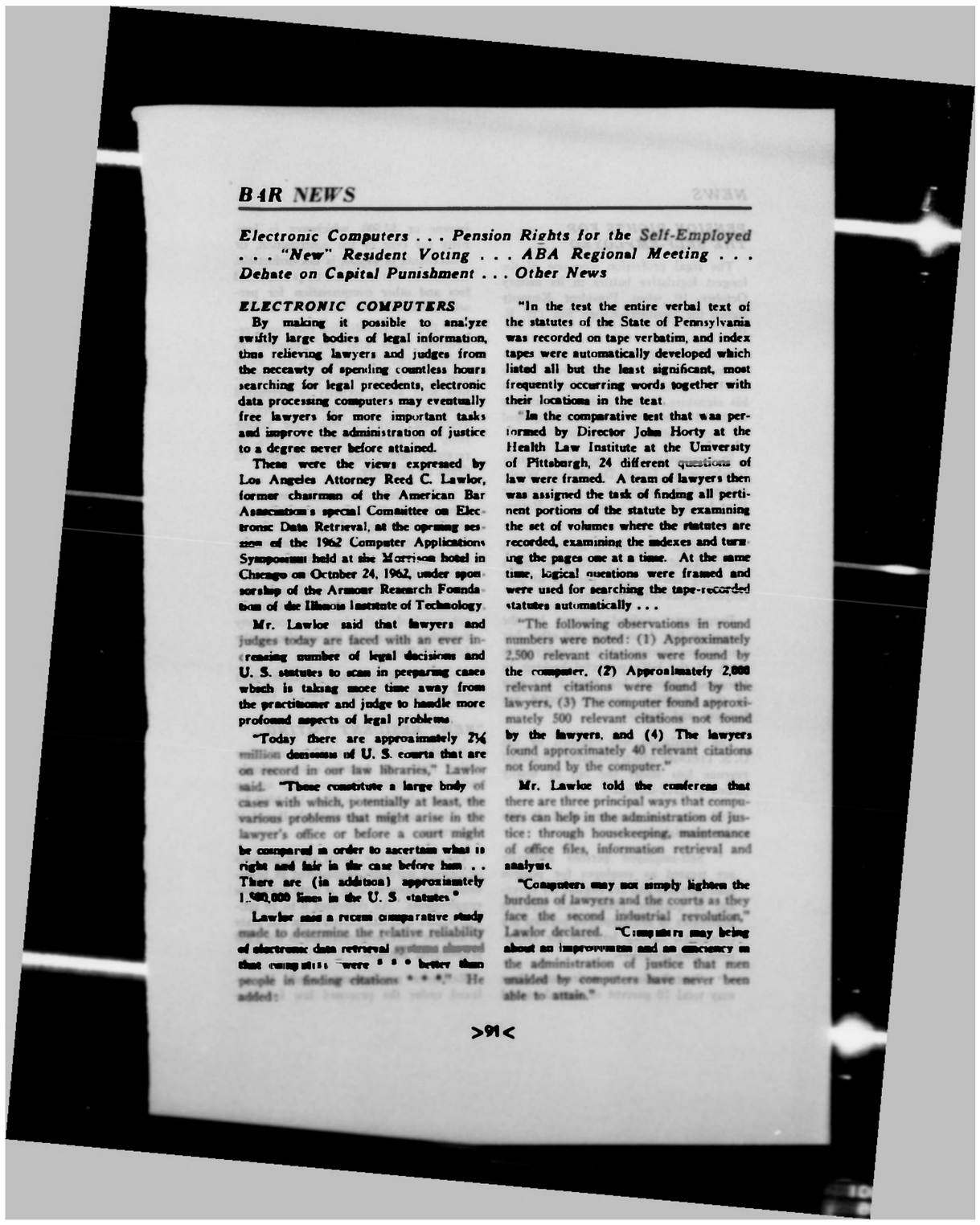
FEBRUARY 19 (Tuesday)—Committee on Taxation Luncheon Lecture and Discussion. New York University Club, 123 West 43 St., 12:00 Noon to 2:00 P. M.

Topic: "Travel and Entertainment Expenses Under Revenue Act of 1962."
Speaker: Ira J. Palestin, Esq., New York State Tax Commissioner.

FEBRUARY 28 (Thursday)—Forum Evening. Association Auditorium, 7:45 P. M.

Topic: "The Functions of the Administrative Judge of the new consolidated Supreme Court for the 1st Judicial District under the new Judiciary Article."

Speaker: Hon. Saul S. Streit, Administrative Judge of the new consolidated Supreme Court for the 1st Judicial District.



BAR NEWS

Electronic Computers . . . Pension Rights for the Self-Employed . . . "New" Resident Voting . . . ABA Regional Meeting . . . Debate on Capital Punishment . . . Other News

ELECTRONIC COMPUTERS

By making it possible to analyze swiftly large bodies of legal information, thus relieving lawyers and judges from the necessity of spending countless hours searching for legal precedents, electronic data processing computers may eventually free lawyers for more important tasks and improve the administration of justice to a degree never before attained.

These were the views expressed by Los Angeles Attorney Reed C. Lawlor, former chairman of the American Bar Association's special Committee on Electronic Data Retrieval, at the opening session of the 1962 Computer Applications Symposium held at the Morrison hotel in Chicago on October 24, 1962, under sponsorship of the Armour Research Foundation of the Illinois Institute of Technology.

Mr. Lawlor said that lawyers and judges today are faced with an ever increasing number of legal decisions and U. S. statutes to scan in preparing cases which is taking more time away from the practitioner and judge to handle more profound aspects of legal problems.

"Today there are approximately 2½ million decisions of U. S. courts that are on record in our law libraries," Lawlor said. "These constitute a large body of cases with which, potentially at least, the various problems that might arise in the lawyer's office or before a court might be compared in order to ascertain what is right and fair in the case before him . . . There are (in addition) approximately 1,500,000 lines in the U. S. statutes."

Lawlor said a recent comparative study made to determine the relative reliability of electronic data retrieval systems showed that computers were "10 times better than people in finding citations * * *." He added:

"In the test the entire verbal text of the statutes of the State of Pennsylvania was recorded on tape verbatim, and index tapes were automatically developed which listed all but the least significant, most frequently occurring words together with their locations in the text.

"In the comparative test that was performed by Director John Horty at the Health Law Institute at the University of Pittsburgh, 24 different questions of law were framed. A team of lawyers then was assigned the task of finding all pertinent portions of the statute by examining the set of volumes where the statutes are recorded, examining the indexes and turning the pages one at a time. At the same time, logical questions were framed and were used for searching the tape-recorded statutes automatically . . .

"The following observations in round numbers were noted: (1) Approximately 2,500 relevant citations were found by the computer. (2) Approximately 2,000 relevant citations were found by the lawyers, (3) The computer found approximately 500 relevant citations not found by the lawyers, and (4) The lawyers found approximately 40 relevant citations not found by the computer."

Mr. Lawlor told the conferees that there are three principal ways that computers can help in the administration of justice: through housekeeping, maintenance of office files, information retrieval and analysis.

"Computers may not simply lighten the burdens of lawyers and the courts as they face the second industrial revolution," Lawlor declared. "Computers may bring about an improvement and an efficiency in the administration of justice that men unaided by computers have never been able to attain."

PENSION RIGHTS FOR THE SELF-EMPLOYED

The legal profession won one of the longest legislative battles in its history October 10 when President Kennedy signed the Smathers-Keogh Bill (H. R. 10).

The President's action was taken without comment less than six hours before the bill would have become law without his signature, adding a dramatic climax to the 11-year battle of the self-employed for more equitable pension privileges.

In summarizing the impact of the new legislation, F. Joseph Donohue of Washington, D. C., chairman of the American Bar Association's Committee on Retirement Benefits, said:

"Although some of the major benefits were reduced, the bill provides incentives for many self-employed persons to participate in tax-deferred plans."

Proponents credited support by the American Bar Association and other bar associations throughout the country with much of the bill's powerful backing in Congress although less than 2 per cent of the 19-million persons affected are lawyers and doctors.

The legislation was opposed by the U. S. Treasury which estimated the annual revenue loss under the bill as finally passed at $115-million.

Following is a summary of H. R. 10's major provisions:

• Self-employed persons generally are treated as employes for pension plan purposes and are eligible for coverage in qualified plans. All separate businesses of self-employed persons are considered as one business for retirement plan purposes.

• Contributions to retirement plans may total 10 percent of annual earned income or $2,500, whichever is less. Fifty per cent of the contribution, or a maximum of $1,250, is tax deductible. Earned income is defined as professional fees and other compensation for personal services.

• Persons establishing their own retirement plans also are required to cover all full-time employes with more than three years of service. Coordination with social security is permitted under certain circumstances. A special averaging device provides for taxing lump sum payment after age 59½, or received before age 59½ because of death or disability.

• Custodial accounts in banks are permitted in lieu of trusts if investments are solely in regulated investment company stock or life insurance policies. If a plan is funded entirely through life insurance, endowment or annuity contracts purchased from a life insurance company, a bank trustee is not required if the insurance company furnishes appropriate information to the Internal Revenue Service.

• The bill becomes effective with the tax year beginning Jan. 1, 1963.

"NEW" RESIDENT VOTING

A uniform law designed to provide new voting rights to America's increasingly mobile population was endorsed on an emergency basis on October 12, 1962 by the American Bar Association's Board of Governors.

The proposed law would affect millions of citizens normally disqualified in presidential elections because of state residence requirements. An estimated 6 to 10 million voters who had moved from one state to another were so disqualified in the 1960 presidential election.

Residence requirements would be relaxed under the proposed law for new

residents who meet other voting requirements.

The proposal was drafted by a special committee of the National Conference of Commissioners on Uniform State Laws. The Conference, composed of delegates from each of the 50 states, approved the draft at its annual meeting August 3 in Monterey, Calif. Louis A. Kohn, 231 S. LaSalle, Chicago, is chairman of the special committee.

The emergency action was requested by the Commissioners on Uniform State Laws so that a full-scale campaign for the new legislation can be completed before the 1964 President election. Many state legislatures hold biennial sessions early next year.

In brief, the draft uniform law provides that new residents may qualify to vote by filing an affidavit stating their age, U. S. citizenship, previous address and length of residence in their new state. A duplicate of the affidavit would be filed with election officials in the last home state to prevent duplicate voting. If qualified under all requirements of his new state, except length of residence, the voter then could cast a special ballot for president and vice-president only.

ABA REGIONAL MEETING

The general committee for the American Bar Association Regional Meeting to be held in Syracuse, N. Y., April 17—21, 1963 is working very hard for the success

George B. Peluso, Chairman of the Publicity Committee, urges ABA members to attend.

DEBATE ON CAPITAL PUNISHMENT

"Resolved that Capital Punishment Must Be Abolished" will be the topic of a debate to be held on January 18, 1963 at the headquarters of the English-Speaking Union, 16 East 69 Street at 8:00 P. M. Gil Offenhartz and George Oppenheimer, members of the English-Speaking Union of the United States will represent the affirmative; Charles Moerdler and Martin Lieb, members of the Young Lawyers' Committee of the New York County Lawyers' Association will represent the negative.

Prior to the debate the film entitled "The Death Penalty," produced by the British Broadcasting Company, will be shown.

The views to be presented by the negative are entirely those of the individuals for the purposes of this debate and not necessarily those of the Young Lawyers' Committee or of the New York County Lawyers' Association.

SPEAKERS INVITED

Tom L. Peterson, Chairman of the Junior Bar Committee on Continuing Legal Education of the Bar Association of Hawaii, extends an invitation to members of the New York County Lawyers' Association who may have travel plans which include Hawaii.

A program of evening seminars and luncheon meetings is being planned for 1963 which will be attended by both senior and junior members of the Bar Association of Hawaii who are interested in hearing lawyers and judges from the mainland discuss their point of view on any topic of legal interest.

Members of the Association who may be passing through Hawaii on business or pleasure trips during 1963 are invited to write Mr. Peterson at Cathcart, Carlsmith, Wichman and Case, P. O. Box 656, Honolulu, Hawaii.

(Bar News continued on page 103)

How the Wheels Go Around Inside the United States Court of Appeals, Second Circuit—with Commentary.

The Decisional Process*

by

HAROLD R. MEDINA

There are lots of people, lots of lawyers who know the things that I am going to talk about tonight. They know them either because they have had some intimacy with my court or with the judges. But the fact is that the majority of the lawyers do not know. I think they should know. There is nothing secret about it. • • •

So let us start with the making up of the day calendar for a week. Suppose a panel of three judges of our court is going to sit for a week, we will say two weeks from next Monday. We always sit a week at a time, Monday through Friday. One of those judges will be the presiding judge, and, except for the Chief Judge who always presides when he sits, the others will preside according to the seniority of their appointment to the court. • • •

Now, that presiding judge has considerable responsibility and what he may do with respect to a variety of matters may make a considerable amount of difference to the lawyers.

The first thing he has to do under our present system is to make up a calendar for the week in which he is going to preside. We are now supposing we are talking about the week's work two or three weeks away; and I am to preside. So, in the order of the sequence of the filings, the Clerk will send up to me the briefs and what we call appendices in a group of cases for Monday, for Tuesday, for Wednesday, for Thursday, for Friday, and I will go over them.

That is the first thing the presiding judge does in arranging the calendar. And as the presiding judge, I go over the cases listed by the Clerk; look to see if there are any reasons why any of the judges who are going to sit may be disqualified; look to see that the times that the lawyers have asked for argument are appropriate for those particular days and for the individual cases, and by and large with very few differences approve the selections as they come up from the Clerk. Applications for postponement of argument are made in advance of the appearance of the case on the day calendar. These are disposed of by the presiding judge and they are generally denied.

So the calendar has been made up. Then the briefs and appendices in these cases are distributed to the other judges who are going to sit on the panel. • • •

Do all the judges read all the briefs and appendices? No. This is the inside of the government process I am telling you now. And they do not all read them. Some will read them carefully; some will have their law clerks read them and will discuss the cases with their law clerks before they go on the bench. Some of them will glance through them and get the points and read the opinions that are written by the courts below. • • •

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* Excerpts from an address by Hon. Harold R. Medina, Judge of the U. S. Court of Appeals for the Second Circuit, delivered at a Forum Evening of the New York County Lawyers' Association on April 26, 1962 at which Henry E. Alexander, Chairman of the Forum Committee, presided.

My own feeling is that it helps me if I have read the briefs and the records before I hear the arguments. I know the things I want to ask the lawyers about. I know the things that are doubtful in my mind. I know the things on which I want further enlightenment. Not infrequently there will be something on which I would like one of the lawyers to give a supplementary brief explaining certain authorities or something that he has not put in the briefs already filed. But you cannot expect all the judges to react the same way. • • •

Anyway, there is the preliminary part about whether the judges read the briefs and the records before they go on the bench. And the answer is in our court most of them do. Some of them read them more carefully than others. Many of them will talk about the cases in advance with their law clerks. And they know a whole lot more about those cases than in the old days when we lawyers used to get up there and the judges did not know anything about the case until the lawyer for the appellant started to explain it to them.

Now, we get to the first day which is Monday, and we have our motion calendar. I think that is the thing that most of the lawyers know very little about, unless they are in the court a good deal. And these motions—well, sometimes we will have as many as 20 or 30 of them on Monday before the day calendar is called. There may be emergency motions on other days also. Ordinarily, the motions will be motions to dismiss appeals; motions for extensions of time; motions for stays; motions for bail. If somebody has been convicted and the trial judge has refused bail and the man is just about to be taken off to jail you must have it come up quickly. And I may say incidentally that over the years one of the very bad things was the tendency after a man was convicted to deny any bail almost as a matter of course, and then leave it to the Court of Appeals to let him out on bail if they thought they should. It seems to me that under the Constitution the man is entitled to be let out on bail, provided the appeal is not frivolous or the man a bad bail risk.

We had one case years ago when I was at the Bar. The defendants were convicted and the judge who tried the case denied bail. The Court of Appeals denied bail and then their conviction was reversed. And in the meantime they had been in jail and had served the entire sentence, which was only something less than a year.

Suffice it to say that things have changed. There is more liberality about granting bail pending appeal.

Then you have these prohibition and mandamus applications that come on our motion calendar. We have no interlocutory appeals, speaking generally, except when a certain procedure has been followed, which I shall not take time to describe. • • •

If the ruling below seems to be something very bad and very outrageous, then we may grant what they call an application for prohibition or mandamus, which is a sort of a reversal of an interlocutory order. And we will get maybe two or three of those there on each motion calendar; but most of these are denied.

Now, those motions are called. They are marked ready for argument just as they would be in any other court. Some of them get put off, but not many. Incidentally, just as with the cases on the day calendar, these motions are argued. No submissions. None of that. We want to hear argument on all the motions and on all the appeals. So that where you save a lot of time by submitting, we do not take submissions. I won't say there has never been a case in the history of the Court of Appeals where they did not take a submission. But generally speaking they don't do it. • • •

Many of the motions are decided off the bench. On some of them, that seem a little more intricate, that there is doubt about, we reserve decision, but this is all done right out there in open court.

We look at those papers, the judges do. We don't turn them over to somebody else to read. But each one of the judges gets a set of each of those motion papers just as the motions are called, and we take those back to our chambers when we reserve decision. We study those and go over them with our law clerks and, except in most unusual cases, by Friday afternoon of the same week all the motions have been decided.

Also every Monday we have a large number of what are called *in forma pauperis* cases, in which a prisoner is seeking some sort of relief by way of reviewing a state or federal conviction. These are generally cases of appellants who have been in jail for years, and they claim that their trial had some constitutional infirmity: that there was a confession induced by violence, an involuntary confession, or they did not have a lawyer. Naturally, you cannot hear argument in these cases because the man is in jail. It would be a lovely thing if he could get out of jail and take a trip down to New York just to argue in person an application for leave to appeal *in forma pauperis*, or for assignment of counsel. So these motions are all submitted.

For these *in forma pauperis* applications we have a special man in our court, a law clerk who does nothing but study the papers in these cases and prepare and submit to the judges memoranda concerning them. The reason we do that is that you cannot make head or tail out of many of them, they are so mixed up and confused. • • •

How about the law clerks? If you read articles by commentators and newspaper writers, you will get all sorts of queer notions about what the law clerks should do or should not do. Some people seem to be obsessed with the idea that these bright young men and women decide all the cases and write most of the opinions. We get nowhere by crying them down. The plain truth is that the judges, in varying degrees according to their temperaments, pay a great deal of attention to their law clerks. So let us look and see what we do with the law clerks. Maybe one judge might want to have the same man as his law clerk for ten or fifteen years. And then he would take a great burden of work off that judge because he would get so much experience in all that time. But the way every judge in our court does, so far as I know, is to take a recent graduate from some good law school and keep him for only a year. And then he gets a new one. • • •

And to say you do not pay any attention to what the law clerk tells you is just nonsense. Of course you pay attention. You are fighting with the man half the time, arguing over the facts of these cases; arguing over the law; arguing whether a case means this or whether it means that. And I tell you, these boys put up a fight. They don't do any fooling around. You would really think they were the judges. That is all right. I like that. That is good stuff. You know, Judge Learned Hand used to call his law clerks the "puny" judges. Remember that the word *puisne*, is pronounced "puny, and it means an "inferior" or "junior" judge.

Anyway, to come back from this digression, after the motions we hear the Monday cases, that is to say the one or two cases that are on the day calendar. We sit from ten-thirty to one-thirty, which is not a particularly convenient time of session. Why they picked that time I don't know. Of course, there is always someone arguing at one-thirty. We go on to 1:45, 1:50. We manage to get lunch finally and get back to our chambers. Then I sit down with my law

clerk about the two cases that were argued that Monday; or if it's Tuesday's cases, maybe the four cases that we heard that Tuesday. So I tell him what the arguments were; I tell him what questions were asked by the judges. And then we will argue around until we decide which one of us is going to pursue the next stage of the work on that case. • • •

We don't have any discussions between the judges until after every judge has prepared and circulated to the other judges on the panel a written memorandum of the points, his views about those points and how he tentatively votes either to reverse or to affirm or to modify or to dismiss the appeal or whatever it might be.

Let me tell you, my friends, that is a wonderful system. In that way every one of those judges is bound to do a certain amount of work on every case. Nobody knows as yet who is going to have the opinion assigned to him. And you are not supposed to look at the memoranda of the other two judges when they come in, until after you get up your own memorandum and send it out. Now, I don't say that we never peek. Everybody is human. And any system must allow for a little elasticity. But there is not an awful lot of it. And we wait until we get our own memorandum out before we look at what the others have to say. • • •

Of course, these memoranda vary considerably. If you stop to think of the time element that you have, with maybe from 17 to 24 cases heard in the course of a week, you can just see from the time element alone that they cannot all reflect exhaustive research or equal depth. Once in awhile you will have a judge who doesn't say much, but not often. Almost always you will find that putting those three memoranda together, each one of them makes a real contribution to the case. One judge will notice this, another judge will notice that; sometimes one will notice something different. So that when you get those memoranda together you have got a composite view of each case. And as I said before, in my own humble judgment it is the only way you are going to get each of the three judges to work on every one of the cases. I want to add a footnote: of course, even that does not make them all work on each of the cases. You cannot make anybody do anything. But by and large it is a fine system and it works very well.

So you come down then to the conference on the following Wednesday or Thursday, sometimes later. At the conference the presiding judge will have the list of the cases. He will have the memoranda all tabulated. He will see who votes for affirmance; who votes for reversal. He will see where there is an apparent difference of opinion about the law, and he will have that all checked out in front of him there. The judges will then go from case to case, discussing the case, arguing backwards and forwards, backwards and forwards, and reaching a decision as to what they want to do.

Let us suppose that case number one is one of these stinkers. You say, what is a stinker? They are these complicated cases. As we judges say, they are full of hugs. There are all kinds of cross-currents running this way and that way. The arguments of the lawyers sometimes meet head on but more often miss one another in the fog and the whole thing is one complex mess of confusion. And it is hard to make head or tail out of the case. And you would be surprised how many of the cases are that way. Some of them are extremely important cases. Some of them are very complicated cases on the facts.

Suppose this first case is one of those stinkers. Everybody has drawn a reasonable amount of work on it, but nobody really understands it fully, except each has a general impression about how it

ought to be decided. You may be guided by the opinion of the court below. But sometimes the opinion below is only a few sentences, or there is no opinion at all. Sometimes the trial judges do not take the trouble to make any findings. You would be surprised how many things can contribute to make what I call a stinker.

All right. Now you have such a case here, number one. Well, we argue around. And we finally decide that we are going to reverse that. So that number one is noted for reversal. The opinions are generally not assigned until we go down through the whole list of cases.

Let us go ahead a little way so as to keep our minds on that same case. Let us suppose that when we come to assigning the opinion, that is assigned to Judge *A*. This assigning the opinions, my friends, is the hardest part of the job. That is the most interesting and the most delicate part of the job. And it may be that when the judges were getting up their memoranda maybe Judge *A* was saying to himself, "That's one case I do not want." • • •

I have a footnote here. I do not deny that it is a pretty difficult thing in many cases to decide what is "right." We could discuss that for hours. What I am trying to say is that the primary job of every judge is to decide each particular case according to his lights in such a way that he is as satisfied as it is humanly possible to be that he has made the correct decision, according to the law as he understands it, and taking into consideration all the facts and circumstances of the case. He is not supposed to be the High and Mighty Ruler of the Universe, dispensing justice according to what the Great Mogul thinks is "fair."

So we have given that number one case to Judge *A*. Now we will say that Judge *A* gets busy writing the opinion and he comes out just the opposite to the way we agreed at the conference. We agreed at the conference it was to be reversed, but Judge *A* after he worked on it comes out for affirmance. Is there anything wrong about that? Certainly not. We have had that happen in our court again and again. These memoranda we circulate before we have our conference are preliminary; necessarily so. You can't study all the cases cited in the briefs the way you ultimately are going to do, nor can you make more than a cursory examination of the facts. Before the conference you haven't the time to do that.

So that Judge *A*, when he writes that opinion, may come out for affirmance instead of reversal. Then he circulates that opinion to the other two judges. And I have seen at least three instances since I have been on the court where, after they all voted one way at the conference, the man who wrote the opinion wrote an opinion the other way and they all concurred.

Now, the importance of that is to show you that this is a process of study and consideration that goes carefully along. If a judge, having said he voted to reverse, comes out thinking that it ought to be affirmed, is not bound by that vote. Nothing is binding until the last concurrence or dissent is in and the opinion is filed. That is the only time there is any finality. And then, of course, the decision is subject to a petition for rehearing. • • •

Another thing people say: Oh, the lawyers—we are afraid the lawyers influence the judges.

What the devil are they supposed to do? You spend your whole life going to law school and learning the art of advocacy. You are studying how to come into court and argue a case. If you are not able to convince the judge; if you are not able to influence the judge, you are not doing your job. Of course we judges are influenced by the arguments

of the lawyers. We are affected by their analysis of the cases; the way they arrange their points; the way they present them in their briefs; the way they argue them. • • •

Now you come to writing these opinions. Each of the judges has a secretary who does the typewriting and answering the telephone and all that. And we have a law clerk. The Chief Judge has a couple of law clerks because he has the administrative duties to perform. Some judges seem to think they can handle three or four law clerks. Well, I have all I can do handling one law clerk. But anyway, the regular staff is a secretary and a law clerk • • •

Some judges get their work out very peremptly. Sometimes I guess work gets out a little too hurriedly. Some judges just cannot make up their minds. They play with the thing; they fuss with it. Time goes by. Even the simplest things.

I know in the old days if we argued a case in the Appellate Division we knew pretty well when it would come down if it was an affirmance. If it was past that time we had a pretty good idea there was going to be a reversal.

In our court you may have a case that the judges have decided at their conference. There was no doubt about it at all. And the opinion does not come down for three or four months. All this time the lawyer for the appellant is saying: "Boy, I bet I got a reversal there," when it's just because that particular judge to whom that opinion has been assigned is behind in his work and he has not yet got around to that one.

It is just that people are different. Some people are so quick. Some people think fast. Some people read quickly. You know, we even have a couple of judges who actually believe they can read the briefs and listen to the oral arguments at the same time. I do not believe it can be done, but I am not positive • • •

To me, writing the opinions is a big joy of the job. I write all my opinions out in handwriting. I have a stand in my chambers like the reading desks used by the monks in the Middle Ages. I have another one down at my place in the country. I stand up there with books and a pad and I write my opinions standing up. And I read my law standing up. • • •

You will say, "Judge, you must be crazy. Why write an opinion in longhand?"

I don't know if there is any sense in that. But I like it. I stand there and I make my little changes and interlineations and inserts. And I will indicate what I want my law clerk to do. I will want him to check some cases for such and such a footnote, and I will want him to check out such and such opinions and whether this or that statement is right or not • • •

Learned Hand had one of those boards and he would have that board up over his arm, and he would be leaning back in his chair there writing with his pen on the pad and the pad was on this board. That is the way he wrote. And he wrote everything. He wouldn't even let a law clerk write a sentence, not one sentence. He would let the law clerk criticize. He would hand what he had written over to the law clerk and let him make all the suggestions he wanted to make. But not one word of that opinion was anybody else's but Learned Hand's • • •

Now, on the other hand, you will find as two of the judges have the same way of doing things. Some of them will have law clerks drafting opinions, playing around with a case, and sometimes opinions will come out and you really can't tell how many cooks had their fingers in the pie. • • • What difference does it make whether the law clerks did some of

the writing or did not. The judges do the deciding and they take the responsibility.
• • •

Now, let me tell you another thing that is very important in our court. There are no cases "affirmed without opinion." They are out. Learned Hand put his foot down on that years ago, and all the years he was there his great influence was against this form of disposition. We don't do that. Sometimes we will affirm on the opinion below.

But even when you have a good opinion below, it is surprising how many times there is something wrong in it. It may be only a small thing, but we cannot affirm on the opinion below unless you are willing to adopt that as the opinion of our court. And we can do that sometimes but not very often. And the rest of them we write. In the cases that we don't think warrant opinions we write *per curiams*. If you could see us working on those *per curiams*, you would have some idea of how all the points argued were considered. • • •

And if you look at these *per curiams* you will find that while they vary, some of them are several pages long. None of them is tossed off without study of every one of the points that are discussed in the briefs.

I have talked longer than I meant to, but there is one thing I want to speak of before I sit down. And that is the facts. I believe as a lawyer I was more impressed with the difficulty of getting judges to study and understand the facts of complicated cases than any other one thing.

There is no use talking about law unless you have got your facts straight. It is all right when you have a simple little accident case or a simple little case with one or two issues. Then there is no problem. But I am talking about the complicated cases, and we have plenty of them. They come up in all kinds of ways.

Now, I would never let my law clerk handle facts. That is one thing I do myself. Whenever an opinion is assigned to me, I read very word of the transcript of the testimony. I get the exhibits up in my chambers and I study the exhibits. And I really get into those facts.

If you will study those opinions sometime you will see the evidence of that. I actually make digests of the principal testimony in these complicated cases, so that when I get into an argument with the other judges, if I am going to get into an argument, I have got the goods there.

That I do not believe in the kind of thing you can turn over to a law clerk who has not had experience appraising facts. There is nothing like experience to qualify a person to put the pieces together. A law clerk can help by checking and verifying references to the transcript or to the exhibits; he can even go further than that: but his chief value to me is reading and analyzing the cases, preparing memoranda on the law and sitting down with me arguing about the various points. A person with a rational mind can generally figure out the law pretty well. But if you once get those facts mixed up, no amount of research and knowledge of the law will lead you to the proper decision of the case. And, don't forget, you have two lawyers there and they can't both be right. Each of them is selling you a different bill of goods. It is not enough to listen to them, read their briefs, and then start gazing or looking at a crystal ball. What gets results is good old elbow grease, studying the record and exhibits and digging out those facts, and doing the same sort of studying and digging with respect to the legal principles involved and their application to the facts of the particular case. • • •

(At the conclusion of Judge Medina's remarks, Mr. Alexander asked for questions to be put to Judge Medina, and the following are some of the questions put and the answers, at least in part, made by Judge Medina.)

Question: One question I would like to ask, Judge: Sometimes you read in the Law Journal of affirmance by the Court in open court. Is it due to the fact that the Court feels there is not enough in the appeal?

Answer: I am glad you brought that up. Very occasionally we will have a case where there is absolutely nothing in it whatsoever. For example, it may be a case involving a simple issue of veracity in some of these Tort Claims Act cases; an automobile accident, and the driver of the mail truck will testify one way and the fellow who got hurt will testify just the opposite. And the judge must decide one way or the other. When we get one like that we will affirm in open court; and generally the next day come down with a very short *per curiam*.

Question: Judge Medina, I wonder if you would care to comment on the reliability of the reaction one is likely to get from oral argument. It has been my experience from time to time that the opinions had very little relationship.

Answer: Oh, my. You know, really, it is the silliest thing for a lawyer to come back and say, "We have it in the bag."

There was one man in a tax case. He got so mad at me he didn't know what to do. He had one of those bird dogs that approaches. I wanted to channel him toward the substantial points which I thought might have more importance; but he was shooting this bird dog all over the place. And I really kept after him. And he was mad as the deuce.

One of the judges said, "You scared the life out of that fellow."

I didn't mean to scare him. But the last thing in the world he thought was that I was with him. When the opinion came down and I wrote the opinion and he won, I bet he nearly fainted.

You can't tell. And I tell you another thing: some judges just don't care much about oral argument. That will surprise a good many of you. They like to have the thing in writing where they can study it. And don't forget also, that some judges don't hear as well as others.

Question: I have one question, your Honor: Is there a tendency among Justices in Appellate Courts to become specialists in particular cases? Is there an automatic process or a process of nature whereby they become specialists in certain cases?

Answer: I do not believe that we have any specialists on our court. And I hope we never will have. I am personally opposed to having the patent cases go to the man who is supposed to know the patent law and the admiralty cases go to the judge who is supposed to know the admiralty law and the copyright cases go to the one who is supposed to know the copyright law and so on.

If you study the course of decisions in our court you will find that practically everybody has written opinions in patent cases. You will find the same thing with the admiralty cases, the collision cases and all that. And I think that is a healthy way to do. In other words, I am utterly opposed to this business of deciding in advance who is going to get the case.

You know, there are courts where, before the judges get on the bench, they know who is going to get the first case; who is going to get the second case; who is going to get the third case; who is

going to get the fourth case; who is going to get the fifth case, and so on.

So the lawyer who is smart and alert, knows who the one judge is who is going to get the case.

And if we had this other business of specializing you would have the same thing. Everybody would concentrate on the particular judge. And in my humble judgment it is not good. I know others have a different view; but I am not aware of any difference of opinion on the subject among the judges of our court.

Besides, the minute you get these men who are experts in some particular specialty, they get playing around with specialized techniques and terminology, and the first thing you know it is all terminology, and justice goes out the window. At least that is the way it looks to me. We dont have specialists in our court. At the same time we must recognize the fact that every one of the judges has a more or less specialised background, and this plays some part in the assignment of the opinions.

Question: To what extent, Judge, are the other judges consulted at all formally or informally in cases where the judge hearing the case wants to maintain some kind of uniformity with respect to a difficult question?

Answer: I suppose you refer to differences between panels. In the old days we never sat *en banc*. Learned Hand was opposed to *en banc* sittings, where all the active judges participated. He thought the differences between panels could be straightened out by the Supreme Court, and that *en banc* sittings would be disruptive of the work of the court. At the time I thought he was wrong; now I think he was right, as usual. As you probably know, the Senior Judges who have retired but still function on the court are not eligible to sit *en banc*, even in cases where the Senior Judge was on the panel, whose decision is being reviewed, and perhaps wrote the opinion.

About discussions between the judges generally I can only say that there is a considerable amount of this discussion, but not as much as you might expect. The exchange of views by written memoranda is more typical. This keeps the record straight and is on the whole very satisfactory. Indeed, with judges residing away from New York City it is in many cases an absolute necessity.

Question: Judge, as a result of your 50 years experience, don't you think that an appellant, if he feels he has a point, should argue his case before the Court?

Answer: Yes.

Question: Irrespective of the Appellate Term or Appellate Division?

Answer: I wouldn't give a cuss what court it was. I would argue for the appellant. I certainly would. Unless the other side confessed error.

Question: Are appeals in civil tax cases handled substantially the same way as any other type of case?

Answer: Yes, but of course, you know they come up in various ways. They may come up through the District Court or they may come from the Tax Court.

Incidentally, it would seem to me that in these tax cases there are lawyers who are tax lawyers and who probably are very fine tax lawyers, but who are really not advocates. And why they hesitate to hire some lawyer that knows his way around courts and knows how to persuade the Court, knows how to clarify things, I just don't understand.

But in some of these tax cases the arguments are very often so obscure and so confusing that they are not too helpful. Like that man I was telling you about with that hard shot. He had more hard shot there, 40 or 50 little points, and you couldn't get his mind on the big

points. Instead of getting a skilled advocate to get up in court and explain the case and argue it, they have the man who is a house lawyer come in and read from a paper and get the case all balled up. So the tax cases are presented extremely well by the men representing the government and they are not presented so well by and large by the men representing the taxpayers. The briefs are pretty good, but the oral arguments many times are not what you would expect with the sums of money that are involved.

Question: Would you care to comment on whether an appeal bench would talk to the trial judge before they have reached their decision?

Answer: Oh, yes. You know, I learned a lot from old Learned Hand. I had not been long on the Court of Appeals when we had a question where there was an ambiguity, and I wondered if I ought to go downstairs to see the District Judge and ask him about it.

He said, "Now, Harold, principle number one. Never forget it. Never talk to the trial judge about anything having any bearing on any of the cases you have before you."

And I think that is the only sound rule. Maybe some of them do, I don't know. But I never do. I don't think it is right.

Of course, you get the information that you want, but you may not get it just right. And in any event, it is not in the record. It is a disruptive procedure. If people learn about it they would become suspicious and the public would think there was some kind of monkey business going on and it just ought not to be done.

BAR NEWS (continued from page 93)

VOLUNTEER APPEAL COUNSEL SOUGHT

Hon. William C. Hecht, Jr., Administrative Justice of the Appellate Term, First Department, which under court reorganization now has jurisdiction of all appeals from the Criminal Court of the City of New York, has written to President Sherpick inviting members of the New York County Lawyers' Association to volunteer their services for assignment as appeal counsel to indigent defendants in criminal cases.

Communications may be addressed to Mr. Justice Hecht or to Abram K. Lind, Esq., confidential clerk of the Appellate Term, or Richard R. Bieber, Esq., clerk of the Appellate Term.

GOLDEN ANNIVERSARY FOR RAYMOND J. HORTON

Congratulations are in order for the New York County Lawyers' Association Assistant Librarian Raymond J. Horton who observed his 50th Anniversary with the Association on December 9, 1962.

Mr. Horton is the first staff member to mark a full half-century of service to the Association and a staff luncheon, hosted by Executive Director Joseph L. Maged, was held in his honor on December 20.

The State Administrator of the Judicial Conference and the Administrative Judge of the New Civil Court of the City of New York Speak of Problems Under the New Court Reorganization.

Problems in Court Reorganization*

Remarks of THOMAS F. McCOY

I have been asked to discuss with you the functions of my office under the court reorganization plan. While it may be an obvious statement, I should clarify the fundamental role of my office at the outset. It is, in sum and essence, the ministerial arm of the Judicial Conference and the Administrative Board in carrying out the functions and duties delegated to them by the various statutes. Therefore, explanation of some of these functions and duties of the Conference and Board will also serve to delineate the functions and duties of my office. These functions and duties are set forth in many statutes—all of which have a direct bearing upon court reorganization.

Section 212 of the Judiciary Law sets forth, in particular terms, those areas which concern the Administrative Board and the Judicial Conference. Let us look at some of these particular subjects.

There is a broad delegation of authority to the Administrative Board to set overall standards and policies with respect to personnel in the court system.

This is a matter which has long caused grave concern in many quarters. In 1951, the Temporary Commission on Coordination of State Activities, after making a limited study of court personnel practices, came to this conclusion:

"It would appear to be in the interest of the Judiciary, the non-judicial employees of the Judiciary, the Legislature and the people of the State that a comprehensive and systematic method of handling personnel and budgetary matters be instituted."

Shortly after the Judicial Conference came into existence, it stated:

"Personnel practices and policies vary from court to court, from judicial district to judicial district, from department to department. Without citation of specific examples, there is little or no standardization in so far as titles, salaries, job content or qualifications are concerned. This condition not only produces a measurable degree of discontent within the court system itself, but it also serves to bring disrepute upon the system and it is seized upon by critics who compare the system always unfavorably and often unjustifiedly, with the operation of a private enterprise."

Unfortunately, there was no clear legislative direction to the Conference to do anything but study the situation and make recommendations to alleviate it. This has now been corrected and steps are being taken to carry out the legislative mandate. We have met with the Civil Service officials of both City and State to establish the respective areas of operation. We have engaged the services of personnel experts. We have met and are meeting with rep-

* Excerpts from addresses delivered at a Forum Evening of the Association on October 23, 1962 by Thomas F. McCoy, State Administrator of the Judicial Conference of the State of New York and Hon. William J. Ecker, Administrative Judge, Civil Court of the City of New York.

resentatives of various classes of court employees and have outlined to them our plans and objectives in the area of personnel. Shortly, we will circulate to the employees job description forms which when filled out and returned will be followed by on-the-spot audits of the jobs. From this information, and consistent with the public policy of the State of New York as expressed in the Civil Service Law, we will devise a complete, meaningful and effective personnel system, standards and qualifications for the entire unified court operation in this State. This is a tremendous task since it involves State, City and County employees who service the courts—nearly 7,000 in all. For example, in the City of New York alone, there are over 220 different titles for court employees. These must be reduced to a meaningful and descriptive minimum—in the interest of the employees and the courts.

Integrally bound up with the problem of personnel is the matter of budgets, another duty of the administrative office. As you may know, non-judicial personnel are paid in many ways from many sources: State, County and City. Moreover, these budgets are prepared, submitted and adopted at different times in the year. There is no set method or procedure for the preparation of budgets. Some are in letter form, some in detail, some in very general terms. As a result it is almost impossible to correllate one budget with another. In order to bring fiscal unity and reason to the court system, the Legislature has directed that, in the future, the Appellate Division will supervise the preparation of the budgets for the courts in its department; these will then be submitted to the Administrative Board for study and recommendation to the appropriating authorities.

We have been provided with the services of budget people who are now, and have been for some time, engaged in examining these budgets with a view toward specification of budget forms and the information required for an honest evaluation of their content.

I ask you to keep in mind that our goal of intelligent budget appraisal must be predicated upon the establishment of a sound personnel system—one is useless without the other. Also in the fiscal area, we must give attention and study to the fiscal practices and problems of the court system. Some courts collect fines, some have monies deposited with them, some have clerks who are required to be bonded—not alone with the idea of uniformity, but to achieve an intelligent, businesslike operation, to help affirmatively rather than mandate, we must establish standards to guide the operations of the courts in this fiscal area.

Keeping always in mind (1) that the disposition of cases is a purely judicial and not administrative function and (2) that there is no intention on the part of the Administrative Board or the Judicial Conference to interfere in any way with this function—there are ways in which the judge can be assisted in this very vital task. The dispatch of judicial business is a matter which should be of interest and concern to all of us. Let me indicate to you why it should be of interest and concern.

At the present time, we have in the Supreme Court of this State a backlog of upwards of 67,000 cases and we are losing ground at the rate of almost 4000 cases each year. In other words, we are taking in more cases than we can dispose of.

The new Civil Court—created by the merger of the City Court and the Municipal Court—commenced operation on September 1st with approximately 110,000 cases to deal with. The new Criminal Court—created by the merger of Special Sessions and the Magistrate's court—must deal, in addition to all its other business, with over 2,000,000 traffic cases per year.

And in regard to the new Family Court —which is one of the cornerstones of this new structure—the burden which has been cast upon it is already a threatening one.

I mention these matters only to preface another of our duties: we must consider and evaluate the assignment of terms and parts, judges and justices: we must devise an efficient, workable and, above all, a timely system for the transfer of judges and justices between courts so that judicial manpower is available where it is needed.

As a corollary, we must continue to seek additional judicial and non-judicial manpower where it is necessary. If the courts are to discharge their duty to the People of prompt, efficient justice, they must be adequately staffed. The matter is as simple as that.

In this connection, too, we are, and will continue to be, concerned with the facilities given to us to conduct court business. It is my opinion that, with rare exceptions, our court facilities are the product of a by-gone day. I often wonder what reaction litigants and jurors have to our courts and the physical setting we provide for the dispensation of justice. Is it too much to ask that the setting be such as to enhance the image of justice and not tarnish it in the eye of the beholder?

In another, but related area, I can report to you that the Administrative Board and Judicial Conference have been concerned—and by statute, must be concerned, with the rules of practice and procedure of the various courts. Once again, against the backdrop of a unified court system, we must and will take steps to coordinate these rules. It is no secret to a practicing lawyer that court rules vary from district to district, from department to department. While some local variances may be desirable, these rules should be uniform. Great progress is being made along these lines in the First and Second Departments and when the task of coordinating and revising is completed, the Bar of metropolitan New York will have a workable set of rules to assist them in processing their cases.

As the agent of the Administrative Board and the Judicial Conference in their continual survey of the operation of the court system, we are obligated to maintain an accurate and speedy reporting system. With the assistance of data processing machines, we are now in a position to know, almost immediately, the state of the dockets in some of our courts. I say *some* because, by Legislative and Executive direction, we will now be in a position to extend our data processing system to other courts. This will relieve the court personnel, to a measurable degree of the chore and drudgery of handwritten reports. It will also have another function—this information properly evaluated will enable us to predict the highs and lows of our caseloads, and furnish a basis for the marshalling and deployment of our judicial and non-judicial personnel to points where they are needed.

The Administrative Board and the Judicial Conference are also required to receive and investigate criticisms, complaints and recommendations concerning the administration of justice. Without any qualification, I can say that it is the policy of the Board and the Conference to check out all such. Some complaints and criticisms are, as you may surmise, without real or substantial basis. Some others have a basis. • • •

We are always glad to receive recommendations for improvement. We solicit suggestions from the Bar. As the technicians you are admirably equipped to aid in administering the system.

In any well run enterprise attention must be given to the tools of the operation. The Legislature, cognizant of this, has commissioned the Administrative Board and Judicial Conference to consider the purchase, exchange, transfer, distribution

and allocation of supplies for the court system. While this is a housekeeping operation, it can be of great significance for the system and the people generally. It may be unfair and unreasonable to equate the operation of the courts with that of a private enterprise but, undeniably, we can borrow much from the experience of private enterprise for our own use. Economy, properly practiced, is a boon. If it can be achieved in the staples of court operation, we will strive to achieve it.

Some, if not all, of you are familiar with the provisions of the Judiciary Law which provide for the institution, maintenance and operation of law libraries throughout the State. A glance at those provisions will indicate to you that the system is a hodgepodge; no statute is related to another although they are to be found together. A short time ago we conducted a survey of these libraries and found, among other things, that there were no standards to govern the purchase or maintenance of collections; that budgets were, in some cases, completely unrealistic for the needs of the libraries; that some collections were insured while others were not; that the managing authorities varied in content and responsibility; that there was, in sum, no cohesion in the operations of what was intended to be a service to the Bench and Bar. This matter has been of great concern. We hope with the assistance of the Legislature this coming year, to pass legislation —one statute which will set out the guide lines for these libraries and help them to discharge their intended function.

I have made reference to the Family Court which began operation on September 1st. It replaces, as you know, the Children's Courts and the Domestic Relations Court. It is a new experiment in family and social relationships. It was designed, I believe, to answer the criticism, formerly voiced, that families were often shunted from court to court in search of a solution to their problems.

If we will admit, as I submit we must, that the family unit is the keystone of our existence, we must also acknowledge that the operation of the court should engage our closest attention especially during this formative period. The Administrative Board has been given the duty of overseeing the operation of the court particularly with respect to Law Guardians and detention facilities, and especially in such sensitive areas as those involving neglected and delinquent children. This is more than just a statistical task. Perhaps, from the information we receive, we will be better able to salvage the family unit and to search out and correct the causes of delinquency which is one of the great problems of our time.

The matter of the family and its problems is one which requires the marshalling and coordination of all our physical and mental resources. It requires cooperation, not competition, between social groups and social agencies, to solve these problems. We must not rest content now that we have a Family Court; it is a community obligation to see that it functions with all the assistance it needs.

The Governor signed into law last year a measure designed to replace the present Civil Practice Act and Rules of Civil Practice. This is a new practice act which will apply to all actions and proceedings which are commenced on and after September 1, 1963. It would also apply to all further proceedings in actions pending at that time, except to the extent that the court determines that its application would not be feasible or would work an injustice.

Chapter 309 directs the Judicial Conference to make studies and recommendations with respect to the Civil Practice Law and Rules and to report its recommendations in these areas to the Legisla-

ture. I am happy to say that, in consultation with the legislative representatives, we have agreed upon a course of operation in this important field.

Of more immediate importance is the fact that the new law becomes operative on September 1st next. We have been reviewing the law and rules with great particularity and, in conformity with the Governor's message on the subject, will make some recommendations to the next Legislature.

In the interest of the Bar and to avoid unnecessary confusion, we have decided to limit our recommendations at this time to the following:

1. Elimination of obvious errors, such as misspellings, typographical errors, erroneous cross references, etc.

2. Assimilation, into the new Civil Practice Law and Rules, of amendments to the Civil Practice Act passed at the 1962 session of the Legislature but not included in the new Act.

3. Minimal—and I mean minimal—amendments to the new law.

I urge you, as I urge all law associations, to keep abreast and informed of developments in the practice field. Time is short until September 1st and this is a bread and butter proposition for all our lawyers. In discharging our tasks under the statute, we seek and solicit your aid. We are also following, with interest and participation, the pending revisions in the Code of Criminal Procedure and Penal Law and Decedent Estate Law. I urge your interest and participation in these programs.

One of the matters which concerns the Judicial Conference and the Administrative Board is of a nature that has no direct effect here in the City of New York. But it does have a measurable effect in rural areas. Chapter 705 of the Laws of 1962 requires the formulation of a training program for Justices of the Peace and Police Justices who are not lawyers. During the past few months, my office, at the direction of the Board, has studied the matter to determine the number of non-lawyer justices, their location, whether or not they have taken training courses in the past, the contents of such courses and related matters. Meetings have been held with representatives of the Magistrates' Association, the Association of Towns, the Conference of Mayors, law schools, the State Education Department and attorneys practicing in these courts.

We have devised a course of training; it will be given under the auspices of some of the law schools in the State under the overall direction of the Administrative Board. It will be operable, as is required, immediately after Election Day this year, to qualify, as soon as possible, those required to take the course.

Along this same line, I can mention that the Judicial Conference has been authorized and directed to conduct conferences or seminars for judges and justices of other courts designed to bring the judges and justices of the state-wide system into closer touch and understanding with each other. You may recall that in June, we did hold the first of a series of such conferences for trial judges. In a word, it was very successful. We hope to have similar ones in the near future to discuss, among other things, the problems of sentencing including disparity in sentences.

Concern with the administration of justice, *per se*, impinges naturally upon other areas. One of these is the matter of retainer and closing statements which, as you know, are now required, by Appellate Division rule, to be filed in our office.

Without attempting to draw any conclusions or moralize in any way, I will

report to you that my office is presently processing in excess of 8,000 retainer and closing statements each week. These emanate from the First and Second Departments and two counties in the Fourth Department. Apart from the number which poses problems in processing the statements, this is a matter which warrants our close attention. The potential of litigation implicit in this volume is very serious.

There are some other matters which occupy or will occupy our attention from now on. The program of State aid toward the payment of some judicial salaries, enacted at the last session of the Legislature, necessitates a bookkeeping system which will permit counties throughout the State to be reimbursed for their first-instance expenditures.

The Chief Judge has also indicated that attention be given to the preparation and dissemination of a uniform jury charge book for the guidance of the courts. He has also manifested concern with the number of judicial opinions which are printed in our reports. These matters are presently under study.

Remarks of WILLIAM B. GROAT

At the same Forum Meeting at which State Administrator McCoy delivered the above remarks, Supreme Court Justice William B. Groat, the Administrative Judge of the new Civil Court of the City of New York, spoke on some of the problems of that new court.

Judge Groat emphasized that the reasons for calendar congestion in the Civil Court, in the Supreme Court and in every other Court in the City are all the same. He said calendar congestion could be eliminated if attorneys marked their cases ready for trial.

He announced that during the week, in Manhattan alone, 7,500 matters had been taken in. "If the 'do-gooders' had left this thing alone, we'd be in better shape than we are in right now. And, if the Administrative Board had left the [closing court] hour at four o'clock, we'd be in better shape, too," he remarked.

Judge Groat said that every possible system was being tried to see how it works, to learn which will work best and which will produce the best results. He announced that Referee Max J. Wolff had been designated head of the law department. "The Court," he said, "is short 75 to 80 clerks."

In conclusion, Judge Groat assured the Bar that they would receive courteous and expeditious service from the Court staff. "We are doing every single thing we can to make things a lot easier for lawyers," he said. "You men and women in this profession of ours have the right to every assistance you can get from us. You can help yourselves most by trying cases. If you'll help us, we'll try to devise the finest system we can to make the calendar function."

His address was greeted with enthusiastic applause.

A Member of NYCLA Presents Suggestions for Improvement of the Procedure for Discretionary Judicial Review.

Judicial Review

by

WILLIAM GOFFEN*

A consideration of *San Soucie* against *Letts*[1] and *O'Neill* against *Schechter*[2] suggests three areas for improvement of the discretionary judicial review procedure. These areas relate to the United States Supreme Court practice of denial of *certiorari* without giving any reason;[3] the absence of original jurisdiction in the New York Court of Appeals[4] to make a complete determination where the entire record is before it; and the absence of jurisdiction in the New York appellate courts to entertain appeals in Article 78 proceedings from so-called intermediate orders remanding matters to administrative agencies.[5]

The background of the *San Soucie* case was the action of *Cunningham* against *English*[6] which sought to enjoin James R. Hoffa and the other officers of the International Brotherhood of Teamsters from assuming the offices to which they were elected at the October, 1957 convention of the International Brotherhood of Teamsters on the ground that the convention was conducted "in a fraudulent, rigged and disgraceful manner."[7] The *Cunningham* case was settled after the plaintiffs rested without any evidence being submitted by the defendants. The terms of settlement provided for the creation of a three member Board of Monitors with recommendatory authority concerning the affairs of the union. Hoffa and the other officers were to assume office provisionally pending the outcome of a new election to be called after the expiration of one year. The new election was to be conducted with such guaranties of the democratic process as the secret ballot, under the supervision of the Honest Ballot Association and with the recommendations of the Monitors. After the new election, the Board of Monitors was to be dissolved.

A new convention was accordingly scheduled for February, 1959, one year after the stipulation of settlement. The Monitors petitioned Judge F. Dickinson Letts who had presided over the *Cunningham* trial to enjoin the new election. Judge Letts fully obliged going so far as to substitute a new order for the settlement order. The new order, entered on February 9, 1959, postponed a new election with its concomitant dissolution of the Board of Monitors until such time as the Monitors should themselves recommend,[8] the exact time to be determined by Judge Letts.

The *San Soucie* proceeding was soon thereafter instituted in the United States

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1 361 U. S. 826, 980.

2 8 N. Y. (2nd) 548.

3 Robertson, R., *Jurisdiction of the Supreme Court*, Section 316, 1951.

4 Constitution, Art. VI, Sec. 7.

5 C. P. A., Sec. 1304.

6 Civil Action No. 2361-57, United States District Court for the District of Columbia. 186 U. S. App. D. C. 70, 92; 108 U. S. App. D. C. 346.

* William Goffen is a Member of the New York Bar, a Lecturer in Law at The College of the City of New York and co-author of "New York Criminal Law," by Schwartz & Goffen.

7 Cunningham complaint, paragraph 65.

8 The financial stake of the Monitors in avoidance of an election was suggested by their bill for services and expenses from February, 1958 to November 4, 1959 in the sum of $200,730.00.

Court of Appeals for the District of Columbia Circuit[9] for a writ of prohibition to prohibit Judge Letts from interfering with the civil right of the members of the Teamsters Union to a free election of their officers. It was urged that Judge Letts had no jurisdiction to substitute a new order for the order of settlement.[10] The Court of Appeals denied without opinion leave to file the petition.

A petition was filed in the Supreme Court of the United States for a writ of *certiorari*.[11] It was contended that there can be no doubt of the extraordinary national and legal importance of a petition by 30,000 union members to prohibit judicial deprivation of their right and that of a membership of 1,600,000 to an honest, free and democratic election of their international officers. The denial for an indefinite period of this right, under the guise of modification of a consent order, was termed a patent deprivation "of life, liberty, or property, without due process of law."[12] Judge Letts' determination was demonstrated to be an anomaly in the law through citation of numerous court precedents establishing that the judiciary theretofore had consistently supported free elections.[13] As Professor Clyde W. Summers stated:

"The right to free and honest elections has been given more clear-cut recognition and more consistent protection. In a number of cases the courts have ordered unions to hold elections when they had been repeatedly postponed and in others, the courts have inquired into the honesty of elections or voided them because they have been improperly conducted. In more extreme cases the courts have appointed receivers to take over the affairs of the union, held an election under the supervision of the court, and installed the elected officers. Judicial action can be obtained when there is clear showing of need, but in those cases the courts act directly to insure free and honest elections."[14]

It was stressed that the Court of Appeals had "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision."[15] However, the Supreme Court denied the petition without opinion and similarly denied without opinion a petition for rehearing.[16] Consequently, no new, free election of officers of the Teamsters Union was held until July 3, 1961, almost two and one-half years later than the stipulation of settlement authorised, and then only after a bill had been introduced in Congress to oust the Court of jurisdiction to appoint a union monitorship.[17]

9 No. 15,076/1959.

10 See *United States v. Swift & Co.*, 286 U. S. 106 (1932).

11 October Term, 1959, No. 194.

12 Constitution of the United States, Amendment 5.

13 *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 34 (1937); *System Federation No. 40 v. Virginian Ry. Co.*, 11 F. Supp. 621, aff'd 84 F. 2d 641, aff'd 300 U. S. 515 (1937); *Myers v. Louisiana & A. Ry. Co.*, 7 F. Supp. 97 (1932); *Malloy v. Carroll*, 272 Mass. 524 (1930); *Webster v. Rankins* (Mo. App.), 50 S. W. 2d 746 (1932); *Robinson v. Nice*, 235 Mo. App. 461 (1940); *Harris v. Geier*, 112 N. J. Eq. 99, 105 (1932); *Local No. 11 v. McKee*, 114 N. J. Eq. 555 (1933); *Collins v. International Alliance of Theatrical Stage Employees*, 119 N. J. Eq. 230, 247 (1935); *Local No. 373 v. International Association*, 120 N. J. Eq. 220 (1936); *Campisi v. Moreschi*, (N. Y.), 187 Misc. 195, aff'd 268 App. Div. 66, aff'd 399 N. Y. 632 (1955); *Dalev v. Stuchel*, (N. Y.), 2 App. Div. 2d 287, 6 App. Div. 2d 1 (1958); *Dusing v. Nuzzo*, (N. Y.), 177 Misc. 35, Mod. 263 App. Div. 59 (1941); *Dusing v. Nuzzo*, (N. Y.), 178 Misc. 965 (1942); *Bertucci v. United Cement Masons' Union* (N. Y.), 139 Misc. 203 (1931); *Irwin v. Possehl*, (N. Y.), 143 Misc. 855 (1932); *Kemble v. Cannon*, (N. Y.), 154 Misc. 343 (1935); *Raevsky v. Upholsterers' International Union*, 38 Pa. Dist. & Co. 187 (1940); *Ray v. Brotherhood of Railroad Trainmen*, 182 Wash. 39 (1935).

14 Summers, *Democracy in Labor Unions*, a report approved by the American Civil Liberties Union on April 28, 1952. See also Summers, *Judicial Settlement of Internal Union Disputes*, 7 Buffalo Law Review 405 (1958); *Judicial Intervention in Revolts against Labor Union Leaders*, 51 Yale Law Journal 1372; *Election Disputes within Trade Unions*, 86 University of Pa., Law Review 885; 87 C. J. S. Trade Unions, §23.

15 Rule 19 of Rules of the Supreme Court of the United States.

16 Goffen, *Monitors v. the Teamsters*, The Nation, April 6, 1964.

17 H. R. 11245.

Denial of *certiorari* without the expression of any reason remains the general practice of the Supreme Court.[18]

Prior to 1925 when far more categories of cases were appealed to the Supreme Court as of right, it seems that the Court was overwhelmed by the number of appeals. It has been observed:

"The effect which a permissive appeal procedure in a tri-level judiciary can have in controlling the docket of the highest court is nowhere more graphically portrayed than in the experience of the U. S. Supreme Court. While *certiorari* had been in use, in certain types of cases, since 1891, it was not until the 1925 amendment to the judicial code that *certiorari* became the dominant method of obtaining a review by that court.

"Associate Justice Harold H. Burton tells us that in 1924, without an order for advancement, it still required a year to reach a case in the docket of the Supreme Court. He then goes on to say:

'The act of 1925 had the hoped-for results. From the time its full effect was felt, the court has been current with its business.' "[19]

While it is thus apparent that the extension of the *certiorari* procedure has enabled the Supreme Court to keep current, one sometimes wonders what motivates the Court in granting or denying *certiorari*. Indeed, the 30,000 members comprising the petitioner, the Indiana Conference of Teamsters, in the *San Soucie* case and the 1,600,000 membership of the International Brotherhood of Teamsters could not be persuaded of the justice of denial of review in the *San Soucie* case.

The nation's press suggested that denial was due to the impossibility of a democratic election without a "house cleaning" of the union. However, as was pointed out in the petition for rehearing, both the Honest Ballot Association and the Election Institute gave assurances that a free election by the Teamsters Union could be had after six months of preparation and no amount of rationalization can justify the years of preparation taken by the monitors.

The query is suggested by the history of the *San Soucie* case whether the administration of appellate justice would be improved by a requirement that the Supreme Court state its reasons for denial of *certiorari*. The advantage as a guide to the Bar of even a one sentence reason for denial of *certiorari* is obvious and as each petition receives the individual attention of the Justices of the Court anyway, not much additional time would be consumed. It is recommended that the Judicial Code be amended accordingly.

Further queries and recommendations are suggested by the events of *O'Neill* against *Schechter*, *supra*. This was an Article 78 Proceeding instituted in the Supreme Court of New York County by sixty-eight patrolmen petitioning for judicial review of the official answers to ten of the multiple choice questions on a civil service examination for promotion to sergeant in the Police Department. The Civil Service Commission moved to dismiss the petition on the novel ground that the four months' Statute of Limitations expired during a period when the Commission made judicial review impossible by refusing to permit the petitioners to compare their answers with the key answers. Mr. Justice Arthur Markewich denied the motion and gave

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18 Robertson, R. *Jurisdiction of the Supreme Court*, Section 316 (1951).

19 Hamley. *Selecting Cases for Appellate Review*, Page 8, Institute of Judicial Administration, 1956, paper presented at the Appellate Judges seminar held at the New York University Law School, July 18 to August 2, 1956.

the respondents an opportunity to serve their answer and supporting affidavits, with a week thereafter for the reply. Despite the expert authority cited in the petition in support of petitioners' contention that the official answers were wrong,[20] the respondents omitted to support by affidavit their choice of answers. The petitioners' reply gave detailed proof by affidavit of experts and quotations from authoritative books that petitioners' contentions were correct and pointed out that the issue of the Statute of Limitations was *res judicata*. However, Special Term reversed itself and this time sustained the defense of the Statute of Limitations. The Appellate Division unanimously affirmed and unanimously denied leave to reargue and to appeal to the Court of Appeals. However, the Court of Appeals granted leave to appeal.

All evidentiary matter and pleadings required by Article 78 had been served and the complete record was before the Court of Appeals. Judge Charles W. Froessel who wrote the majority opinion reversing the order of the Appellate Division and remitting the matter to Special Term observed on the argument of the appeal that the Court could not dispose of the entire matter. It has no original jurisdiction[21] and Special Term had not theretofore passed upon the propriety of the answers. "The Court has no original jurisdiction; all its business is appellate business."[22]

Of course, if the Appellate Division in a case like the *O'Neill* case had chosen to reverse the dismissal for the Statute of Limitations, with the complete record before it, it could have made a final disposition of the matter on the merits, something the Court of Appeals did not have the power to do. The Appellate Division, being a branch of the Supreme Court, has unlimited original as well as appellate jurisdiction.

The New Jersey Supreme Court, that state's Court of last resort, in a case like the *O'Neill* proceeding would have original jurisdiction in its discretion to make a complete determination without the need to remit the matter to the initial court. The Constitution of the State of New Jersey,[23] provides the necessary jurisdiction as follows:

> "The Supreme Court . . . may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."

As events transpired, over three years were necessary for a complete determination of *O'Neill* v. *Schechter*. The query is, therefore, suggested whether the New York Court of Appeals should not be granted original jurisdiction comparable to that of the New Jersey Supreme Court to make a full determination in its discretion of any cause under review where the record is complete. It is believed that the merits of empowering the Court of Appeals to make a full determination

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20 Typical of the questions *sub judice* were questions 67 and 88 the official answers to which were as follows:

"67. According to the Manual of Procedure, a summons Card (Gen. P. 4a) will not be prepared by a member of the force issuing a summons for:

(d) operating a motor vehicle while intoxicated."

"88. According to the Penal Law, the use of the following threats which is not common to commission of the crimes of extortion and blackmail is a threat to someone to:

(d) kidnap him or a member of his family."

As the Manual of Procedure, Article 31, Paragraph 3, prohibits service of a summons in lieu of arrest upon a person "when the officer is unable to take care of himself, by reason of [illegible] or intoxication," the official answer to Question 67 was correct. The official answer to Question 88 was also correct in its assumption that a threat to kidnap could not be common to extortion and blackmail under the Penal Law, sections 851, 852 and 854. See Record on Appeal *O'Neill* v. *Schechter*, App. Div. First Dept. 1938.

21 Constitution, Art. VI, Sec. 7

22 Cahill and Kenyon, *Powers of the New York Court of Appeals*, p. 6 (1938).

23 Article 6, Section 3, Par. 3.

when a complete record is before it are obvious. As has been well said by the Section of Judicial Administration of the American Bar Association:

> "The fact that error has been found does not necessarily mean that a new trial is necessary. Sometimes the record on appeal contains adequate material from which a proper judgment may be formed. Where this is so, the appellate court should enter or direct the entry of such judgment as permitted by Federal practice. (See 28 U. S. C. §2106). Where the taking of evidence is required only with respect to a separable part of the case, a partial new trial rather than a full new trial should be ordered."[24]

It is therefore recommended that the Constitution of the State of New York be amended accordingly.

After *remittitur* by the Court of Appeals, Justice Markewich declined to proceed with the case which was instead heard by Justice Henry Clay Greenberg. The latter related that the authorities fully substantiated petitioners' contentions concerning the answers under review but he remanded the matter to the Civil Service Commission because "it is not the function of this court to evaluate answers in an examination dealing with technical and highly specialized fields."[25] The Court thereby abdicated its function of judicial supervision of the determinations of administrative agencies.[26]

An appeal was taken from Justice Greenberg's order which was equivalent to a denial of relief. Ten months later, the Civil Service Commission reported in *The City Record* the bare statement that no change would be made in the original answers. The Appellate Division refused to review Justice Greenberg's order on the ground that it was intermediate.[27] It then became necessary to request Justice Greenberg's permission for leave to appeal[28] but he denied this application. The only alternative left for petitioners was to petition all over again to Justice Greenberg. This time he dismissed the petition flatly.

It is difficult to understand the rationale of the Appellate Division's determination that Justice Greenberg's remand to the Civil Service Commission was an intermediate order, in view of Special Term's assertion that it was not the court's function to evaluate answers. In view of Special Term's conviction that it was not its function to review these answers, its order of remand was as final a denial of judicial relief as an order of dismissal of the petition would have been. Perhaps the Appellate Division confused judicial finality with administrative finality. As stated by Cohen and Karger:[29]

> "An Article 78 proceeding, on the other hand, is, for at least some purposes, distinct from the administrative proceeding; so that the administrative determination sought to be reviewed may be non-final, yet an order made in the Article 78 proceeding finally denying or granting the relief sought therein will be held to be a final order determining the judicial proceeding."[30]

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24 The Improvement of the Administration of Justice, 4th Ed., 1961 (p. 87). See also Minimum Standards of Judicial Administration, Edited by Arthur T. Vanderbilt, p. 449 (1949).

25 Rule 72 of the New York Rules of Civil Practice provides that the memorandum of opinion is "part of the record on which the order was made."

26 Meyers, L., *American Legal System*, p. 3 (1955).

27 The Court cited as authority for its conclusion *Matter of American Holding Corporation against Murdock*, 6 App. Div. (2d) 596 (1958), although Special Term in that case did not abdicate its function of judicial review. The order of remand in the *Murdock* case was held intermediate because the agency was required to exercise *quasi judicial* as distinguished from ministerial duties.

28 C. P. A., Sec. 1304.

29 Cohen and Karger, *Powers of the New York Court of Appeals*, p. 128 (1952).

30 *Matter of Wallocks, Inc. v. Boland*, 277 N. Y. 345; *Metropolitan Life Insurance Co. v. [illegible]*, 287; *Armstrong v. Corp. Counsel of City of New York*, [illegible] N. Y. 348.

The query is suggested whether the Appellate Division should have authority to reject an appeal upon a technical interpretation of what constitutes a final order upon remand to an administrative agency which has theretofore fully considered the problem.[31] It is recommended in the interests of justice that the Appellate Division be required to hear appeals even though the orders appealed from remand matters to administrative agencies.[32]

[31] In Matter of *Rochester Gas & Electric Corp.* v. *Maltbie*, 298 N. Y. 103 (1948), the Court of Appeals dismissed an appeal with leave to apply to the Appellate Division for clarification whether the remand to the agency was final or intermediate.

[32] The new Civil Practice Law and Rules which becomes effective September 1, 1963, requires leave to appeal from any order pursuant to Article 78, final or intermediate. A provision authorizing the Appellate Division to grant such leave upon refusal of the judge who made the order or upon direct application should improve the administration of justice. Civil Practice Law and Rules, Sec. 5701 (b) 1, (c). [Laws of N. Y. 1962 Ch. 308 p. 176.]

NEWS OF COMMITTEES

At the Stated Meeting of the Association, held on Thursday, November 15, 1962, the By-laws were amended to provide for the creation of a Committee on the Civil Court to conform to the reorganized court system. The Committees on the City and Municipal Courts were merged into the new Committee.

The Committee on Corporation Law was made a Standing Committee of the Association to consist of twelve members.

The name of the Committee on the Domestic Relations Court was changed to the Committee on the Family Court. The composition of this committee remains the same.

The following list of Chairmen, Vice-Chairmen and Secretaries should be read as a supplement to the list that appeared in the September-October, 1962 issue.

CIVIL COURT
(Formerly City and Municipal Courts)

Harry Sobel ..... *Chairman*

CORPORATION LAW

James J. Fuld ..... *Chairman*

FAMILY COURT
(Formerly Domestic Relations Court)

Jacob T. Zukerman ..... *Chairman*
Philip F. Salzman ..... *Vice Chairman*
Lee F. Benger ..... *Secretary*

LABOR RELATIONS

Harold L. Luxemburg ..... *Chairman*
Nathaniel H. Janes ..... *Secretary*

COMMITTEES

LEGAL AID

Joseph E. Steigman ..... *Chairman*
Abraham Fishman ..... *Secretary*

PUBLIC RELATIONS

M. Marvin Berger ..... *Chairman*
Frances Cymberg ..... *Secretary*

TAXATION

Harry Janin ..... *Chairman*
Morton Pepper ..... *Secretary*

YOUNG LAWYERS

Robert S. Persky ..... *Chairman*
Charles G. Moerdler ..... *Secretary*

LAW DAY SPEAKERS INVITED

William Charles Herman, designated as Chairman of the Law Day Sub Committee of the Young Lawyers' Committee, announces that the Association of the Bar of the City of New York is cooperating with the New York County Lawyers' Association in providing speakers on the topic of "Law Day."

The Law Day Sub Committee's program for Law Day, 1963 has already been set in motion and participation on the part of members of the New York County Lawyers' Association will be welcome. High schools and vocational schools will shortly receive announcements that speakers will be available to address assemblies or classroom groups on the subject of "Law Day," and it is expected that requests for speakers will exceed the number received last year when this phase of the Law Day program gained momentum.

To signify your availability to address a school group, or a civic organization or service club in which you have interest, write to Miss Easly Volp at the headquarters of the Association.

Miss Volp will compile a list of volunteers to forward to the Law Day Sub Committee Chairman William Charles Herman who will make the speaking assignments directly with volunteer speakers.

CLIENTS' SECURITY FUND

President Sherpack, reviewing some of the recent activities of the Association at the Stated Meeting held on Thursday, November 15, 1962, informed the members present of the progress made in implementing the Clients' Security Fund which had been established by the Board of Directors at its meeting on October 9, 1962.

The Board approved the report of a Special Committee chaired by New York State Secretary of State Caroline K. Simon and adopted a resolution stating that the purpose of the fund is to maintain and protect the good name of the legal profession by providing some measure of indemnification and reimbursement to clients suffering losses through any dishonest conduct on the part of lawyers. The Board also appropriated the sum of five thousand dollars to the fund.

(Committee News continued on page 128)

Library Notes and News

LAWRENCE H. SCHMEHL

During the period of October 1962, among accessions to the library were the following important publications, some which are evaluated or commented upon by the Librarian. The Asterisk (*) indicates presentation made to the Association library.

Arnould, Sir Joseph. The Law of Marine Insurance and Average. 15th edition by Lord Chorley of Kendal and C. T. Bailhache. (Stevens & Sons, London, Eng.) 2 vols. 1961. $42.75. A standard work on the subject.

***Association of the Bar of the City of New York.** Mental Illness and Due Process: Report and Recommendations on Admission to Mental Hospitals under New York Law. (Cornell University Press, Ithaca, New York.) 1962. $5.00. See book note v 20:119.

Bailey, Henry J. The Law of Bank Checks. 3d ed. Revised and Enlarged. (The Banking Law Journal, Boston, Mass.) 1962. $20.00. A standard book on the subject.

Bender's New York Law and Proof. By L. R. Framer, E. L. Biskind and R. Milgrim. vols. 1 and 2. (M. Bender & Co., Albany 1, New York.) $250.00. To be complete in 10 volumes. The application of the rules of evidence and of techniques of proof illustrated and explained.

Brahdy, Leopold. Disease and Injury. (J. B. Lippincott Co., Philadelphia, Pa.) 1962. $12.50.

Charlesworth, Dr. John. Law of Negligence. 4th ed. edited by R. A. Percy. (Sweet & Maxwell, Ltd., London, Eng.) 1962. $16.00

Clerk, J. F. and Lindsell, W. H. B. Law of Torts. 12th ed. edited by A. L. Armitage et al. (Sweet & Maxwell, Ltd., London, Eng.) 1961. $24.40. A complete revision and arrangement of a standard treatise.

Doing Business Abroad. Edited by Henry Landau. (Practising Law Institute, N. Y. 7, N. Y.) 2 vols. 1962. $25.00. See book note v 20:120

Fraser, W. Kaspar & Stewart, J. L. Company Law of Canada. 5th ed. by J. L. Stewart and M. Laird Palmer. (Carswell Co., Ltd., Toronto, Canada.) 1962. $44.00.

***Friedman, Milton R.** Preparation of Leases. (Practising Law Institute, General Practice Series. New York 7, N. Y.) 1962. $4.00. See book note v 20:119

Gasaman, Benjamin. Election Law: Decisions and Procedure. 2nd ed. 2 vols. (Williams Press, Inc., Albany, N. Y.) 1962. $37.50. The Standard treatise on the subject.

Gelfand, L. & Magana, R. D. Courtroom Medicine: The Low Back. (M. Bender & Co., Albany 1, N. Y.) 1962. $35.00. An important reference manual for the trial lawyer in a personal injury action involving medical facts and problems in low back injury.

***Greenwood, Glenn.** ed. Index to legal theses and research projects. Publ. No. 9. (American Bar Foundation, Chicago 37, Ill.) Free. "The Little Green Book" includes electronic processing methods used to sort and index legal materials. $3.00

Gross, Dr. Hans. Criminal investigation: A Practical textbook for Magistrates, Police Officers and Lawyers. 5th ed. by Richard Ledéric Jackson. (Sweet & Maxwell, Ltd., London, Eng.) 1962. An Authoritative reference work. $9.75

***Hazard, John N. and Shapiro, Isaac.** The Soviet Legal System. Parker School of Foreign and Comparative Law. Columbia University, N. Y. C. (Oceana Publ., Inc., Dobbs Ferry, N. Y.) 1962. $12.50.

Johnson, Walter S. Conflict of Laws. 2nd ed. (Wilson et Lafleur, Ltd., Montreal, Canada.) 1962. $35.00

Jonas, Leonard A. Legal Forms. 10th ed. 3 vols. (Bobbs-Merrill Co., Inc., Indianapolis, Ind.) 1962. $60.00. A standard guide and authority for preparation and checking of legal forms.

Kelso, Robert Charles. International Law of Commerce. 2nd ed. (Dennis & Co., Inc., Buffalo, N. Y.) 1961. $10.00. An introduction to business law for the prospective foreign trader.

Llewellyn, Karl N. Jurisprudence: Realism in theory and practice. (Univ. of Chicago Press, Chicago, Ill.) 1962. $8.95. A collection of essays by a master craftsman of legal philosophy.

***McDonald, Robert J.** Corporations and Corporate Distributions. (Practising Law Institute. Fundamentals of Federal Taxation Series. New York 7, N. Y.) 1962. $5.00. See book note v. 20:121.

***McWhinney, Edward.** Constitutionalism in Germany and the Federal Constitutional Court. A. W. Sythoff, Leyden, Netherlands. 1962. (Oceana Publ., Inc., Dobbs Ferry, N. Y.) $4.00. A review and study of the Bonn Constitution.

Marsden, Reginald G. The Law of Collisions at Sea. 11th ed. by Kenneth C. McGuffie. (Stevens & Sons, London, Eng.) 1961. $32.00. A standard treatise.

Maxwell, Sir P. B. The Interpretation of Statutes. 11th ed. by Roy Wilson and Brian Galpin. (Sweet & Maxwell Ltd., London, Eng.) 1962. $11.20.

Moore, James W. and Vestal, Allan D. Moore's Manual: Federal Practice and Procedure. (M. Bender & Co., Albany, 1, N. Y.) 1962. $30.00. A handbook on the general practice in the federal courts with references to Moore's Federal Practice and to Bender's Federal Forms.

Norris, Martin J. The Law of Seamen. 2nd ed. 2 vols. (Baker, Voorhis & Co. Inc., Mount Kisco, N. Y.) 1962. $40.00. A current, comprehensive work on the topic.

***Parker, Allan J.** Deductions and credits. (Practising Law Institute. Fundamentals of Federal Taxation Series. N. Y. 7, N. Y. 1962.) $3.00. See book note v. 20:121.

***Russell, Francis.** Tragedy in Dedham: The Story of the Sacco-Vanzetti Case. (McGraw-Hill Book Co., New York, N. Y.) $7.95. See book review v. 20:58.

***Schwartz, Bernard.** An introduction to American Administrative Law. 2nd ed. (Oceana Publ. Inc., Dobbs Ferry, N. Y.) 1962. $7.50. A revised and expanded treatise designed particularly for law students.

***Smith, T. B.** Studies Critical and Comparative. W. Green & Son Ltd., Edinburgh, Scotland. (Oceana Publ., Inc., Dobbs Ferry, N. Y.) 1962. $12.00. The problems analyzed in this book are world-wide. The modern lawyer and legal historian will find these studies profitable reading.

***Szladits, Charles.** Bibliography on Foreign and Comparative Law: books and articles in English 1953-1959. (Oceana Publ., Inc., Dobbs Ferry, N. Y.) 1962. $15.00.

***Toynbee, Arnold J.** America and the World Revolution. (Oxford University Press, Inc., New York, N. Y.) 1962. $4.75. See book note v. 20:121.

***United States Commission on Civil Rights Report.** 5 vols. (1961) Supt. of Doc., Wash., D. C. This Report in five volumes includes all findings and recommendations made by the Commission. $5.25 per set.

***Weinberger, Andrew D.** Freedom and Protection: The Bill of Rights. (Chandler Publishing Co., San Francisco, 5, California.) 1962. $3.00. See book note v. 20:119.

BOOK NOTES

by

L. H. Schmehl

Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control. By William Butler Eldridge. American Bar Foundation. New York University Press, New York, N. Y. 1962. $5.00.

The Administration of narcotics regulation in the United States involves medical, legal and law enforcement agencies. The author of this book limited his research and study to the opiates and their synthetics. Following a review of the legal profession's activities in the field,

Mr. Eldridge presents an exhaustive examination of the evidence and effectiveness of our current program covering narcotic addiction and traffic.

This excellent documentary analysis is well written and provides to the legal profession an impartial evaluation of the problem. Following the textual matter are the conclusions arrived at and recommendations with a series of Appendixes and accompanying notes, including selected references to literature on the topic.

Since compiled statistics give evidence that a major cause of crime in large cities is the result of narcotics, this book is important to the lawyer and of vital interest to concerned citizens for its impact upon our national welfare.

Mental Illness and Due Process: Report and Recommendations on Admission to Mental Hospitals under New York Law. Cornell University Press, Ithaca, New York. 1962. $5.00.

This volume reports the study, conclusions and recommendation resulting from a review of the law and procedure for admission to and release from mental hospitals in New York State. A special Committee to study commitment procedures of the Association of the Bar of the City of New York in cooperation with the Cornell Law School spent almost two years on this exhaustive study resulting in unanimous agreement on the basic principles.

Their recommendations cover Compulsory Admissions, Emergency Admissions, Newer Procedures, Practical Problems, Voluntary Admissions, the Physicians and the Lawyers and the question as to who is Mentally Ill?

This important report in 303 pages is well documented containing Appendixes of Statistical Tables; Some Observations on the Hospitalization of the Mentally Ill under European Laws, by Ruth Roemer; and a comprehensive Index.

In addition to the critical question of admission and discharge, the book deals with two specific problems: (1) the law affecting the property and business interests of the mentally ill, and (2) admissions in criminal cases. The report, however, is not an exhaustive coverage of all problems in these fields.

Preparation of Leases. By Milton R. Friedman. Practising Law Institute. General Practice Series. New York, N. Y. 1962. $4.00.

A revised, current edition of a monograph prepared primarily as an aid for lawyers who lack extended practical experience in drawing leases. It does not purport to be a treatise on the law of leases, but is an invaluable guide to the drafting or passing upon leases. The author provides carefully-worked-out forms with advice and checks against omissions. The coverage is complete; each section discussed is fully annotated with references to case law, treatises, articles, etc., so that one may be assured of the accuracy of the textual matter. Beginning on page 161 there is included a series of descriptive appendixes followed by a work sheet and an index helpful in finding the material to be included in the preparation of the lease.

This compact publication is an indispensable desk manual for the lawyer engaged in the general practice of the law.

A subscription for the several series of General Practice, Trial Practice, Fundamentals of Federal Taxation is a sound investment and an essential foundation to a legal practitioner's library.

Freedom and Protection: The Bill of Rights. By Andrew D. Weinberger. Chandler Publishing Company, 604 Mission St., San Francisco 5, California. 1962. $3.00.

The author, a New York lawyer specializing in constitutional law and the law relating to the performing arts, for

many years has been in the forefront of the civil rights and liberties struggle both in the United States courts and United Nations tribunals.

In the foreword, the learned and experienced writer of this treatise on the freedom of all people describes "Personal Liberty in Today's World" and the perils attendant to its preservation.

The book consists of two parts: (1) The Bill of Rights in History, and (2) The Bill of Rights Today, followed by a series of Appendixes presenting the text of constitutional documents on the Bill of Rights, a bibliography of publications reviewed by the writer, a Table of Cases and an Index arranged by subject matter.

Part I is a brief explanation of the Bill of Rights, its Sources, Anticipations, and Contrasts, and the Judicial Review.

The major section of the book (pp. 21-149), listed as "Part II The Bill of Rights Today," comprises a study and an abridgment of the United States Supreme Court cases covering civil rights. The cases are prefixed by comments and interpretative statements of the author.

In this compact book one obtains a clear understanding of the problem attendant to protection of personal liberty and the danger to its destruction by Nazism, Fascism, Communism and kindred totalitarian governments. The issue of personal liberty is of utmost importance to all of the people and this study by Mr. Andrew D. Weinberger is an important contribution on the subject.

Doing Business Abroad. Edited by Henry Landau. Practising Law Institute. New York, N. Y. 1962. 2 vols. 768 pages. $25.00

As stated in the Introduction to this outstanding current publication (see volume I, p. xxvi) "The purpose of this work is to present the many areas of law and business which must be understood by legal advisers of businessmen who are engaged in or contemplate a foreign business operation."

Twenty-three specialists contributed this expert guidance on all topics regarding American industries' investment in foreign lands. The series of chapters by authoritative law and tax experts covers every phase and problem that exists or may arise for companies already engaged in foreign operations as well as those planning new overseas business.

Everyone concerned with the Common Market and the impact of the European Economic Community will appreciate having this major contribution to current tax, business and legal protection. Resultant United States and foreign taxation, antitrust laws and other regulations, foreign labor personnel and problems, statutory fringe benefits are some of the topics clearly defined and clarified. For each country of Western Europe, Latin America and the democracies of Asia there is included specific country-by-country coverage on preferable forms of business organization and correlated material. Legal requirements for forming branches, corporations, limited liability companies or joint ventures are clearly set forth.

The work also contains a 36 page checklist of every aspect and possible trouble spot, prepared by editor Henry Landau. There is a full bibliography and a comprehensive index replete with information, analysis of problems, solutions and practical suggestions.

This is a contribution of genuine importance to United States businessmen and the legal profession.

Revenue Act of 1962 with explanation. Commerce Clearing House, Inc., Chicago 46, Illinois. 1962. $2.00

In this booklet the publishers present a timely tax aid containing the full text

of the Act (1962 Public Law 87-834) with explanatory matter covering its broad provisions.

The changes include Business Credits, Income, and Deductions; Tax Treatment of Special Organizations; Taxation of Foreign Income and Investment and other important changes in the tax law. Text of the new law begins on page 85; the explanation of the changes is reviewed beginning on page 5.

For an informed and dependable quick reference guide and study of the new tax law, this publication is invaluable.

New Retirement Tax Benefits for Self-Employed. Commerce Clearing House, Inc., Chicago 46, Illinois. 1962. $1.50.

This law (1962 Public Law 87-792) permits the professional or business individual or partner to deduct up to $1,250 annually of amounts set aside under a retirement plan. Employees of the professional or business office must also be covered by the plan, and the amounts directed to financing these benefits become deductible in regular course as business expenses.

In this booklet of 96 pages is presented full details about these new tax and retirement benefits for the self-employed, with explanation, simplification of the rules and various courses of action open to qualified individuals. Pertinent provisions of the Committee Reports are given and keyed by paragraph reference to the law as amended.

This booklet is a dependable, useful guide to tax matters and interests on this important new phase of federal taxation.

America and the World Revolution. By Arnold J. Toynbee. Oxford University Press, Inc., New York, N. Y. 1962. $4.75.

This series of three sets of lectures is important reading to all concerned with America's place in contemporary history. The first set of lectures entitled "The Present-Day Experiment in Western Civilization," is an historical survey of the position of America during its early period. The second set of lectures reviews America in the nineteenth century. The learned author makes a critical analysis of the part America is taking today in World Affairs. He contends America has departed from the inspired leader of the World Revolution to become the leader of a world-wide anti-revolutionary movement in defense of vested interests. The final lectures discuss "The economy of the Western Hemisphere" in the changing world, the Latin American revolution, and sum up with the conclusion that unless social justice is attained by the American democratic revolutionary method, the Russian Communistic revolutionary method will be adopted not only in Cuba, but in other Latin American Countries.

In the minds of thinking Americans these lectures will stir disturbing thoughts regarding our present day position and policy in "One World" as pictured by the late Wendell Willkie.

The brilliant author and lecturer presents a study of ideologies and challenge that concern the welfare and future of America.

It is recommended reading for a clearer insight and understanding of the alien reaction and attitude regarding American Foreign Policy.

Deductions and Credits. By Allan J. Parker. 1962. $3.00. **Corporations and Corporate Distributions.** By Robert J. McDonald. 1962. $5.00. Practising Law Institute. Fundamentals of Federal Taxation Series. New York, N. Y.

These two monographs, issued as units of the Federal Taxation Series cover important phases of taxation.

Mr. Parker provides a dependable guide to the factors controlling the calculations

of taxable income. Following an introductory statement, the author discusses Business Expenses, Property Deductions, Income-Producing Activities, Individual Standard Deduction, and Allowable Credits.

Mr. McDonald contributes a guide to the taxation of both the corporation and the distributees of distributions made by it. His monograph provides guidance as to the Taxes to Which a Corporation May Be Subject, The Tax Base, Corporate Distributions, Stock and Shareholders, Redemption Through Use of Related Corporations, Corporate Liquidations, Collapsible Corporations, Subchapter S, Penalty Taxes and other pertinent matter.

Both publications merit attention and careful study, being written by informed and experienced lawyers who are accepted and recognized specialists in the field of federal taxation. To the practising lawyer it is important to know about federal taxation and to keep abreast of current changes. These two publications serve this purpose in the related subjects considered by the writers.

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Recent Books

COL. DAVID MARCUS

Cast A Giant Shadow. By Ted Berkman. (Doubleday and Company, New York, 1962. $4.95, 321 pp.)

David Marcus, the subject of this book, was a lawyer, admitted to the New York Bar in 1928. At the time of his death he was, and since 1935 had been, a member of the New York County Lawyers' Association. He had been a Civil Service attorney with the Treasury Department of the United States, an Assistant United States Attorney for the Southern District of New York, Commissioner of Corrections of the City of New York and a temporary Magistrate, as well as a practicing attorney.

While this book by Ted Berkman is primarily concerned with David Marcus' activities on behalf of the State of Israel during its many troubled days, as a soldier and leader, it seems abundantly clear that his experience as a lawyer, the precepts of justice which he learned in the practice of law, served to make him the kind of man he was and imbued him with such a deep and fervent sense of right and wrong as he felt it in daily life, that he was ready to give his life to uphold those principles.

The general public is invariably ignorant of the details of a man's life, although it is usually well known to his friends and intimates. What impels a man to do certain things is shrouded in mystery and seldom is brought to the surface.

The life of David Marcus, affectionately known as "Mickey," has been presented to the public in this book. It is a life filled with contradictions and with seemingly unexplainable actions. It would have been easier for Colonel Marcus to have lived his life in complacence. It would have been easier to have followed the practice of the law and with his personality attained great success and riches. It would have been easier to have remained at home with his beloved wife who would have shared in his prominence and prosperity. The motivation for, and explanation of, one man's reaction to the outside world

are made plain. When moral issues and justice were involved David Marcus was prepared to sacrifice all other considerations. His whole life is a recount of his reactions to those moral issues. His boyhood was steeped in poverty which he surmounted with the help of his brother. His attendance at the United States Military Academy was an ordeal which he also surmounted. His political activities brought him into close contact with the reform element in the City of New York at the time when the City of New York desperately needed reformers. His personal integrity endeared him to Mayor LaGuardia who placed him in positions of trust and confidence. With his background of public service and dedication he could have gone far as a political candidate and as an active practitioner of the law.

However, when World War II threatened, and which he foresaw, "Mickey" Marcus re-entered the Army of the United States and expended all his efforts in its behalf. His value as an organizer and planner was such that his assignments were of the highest levels, all of which he executed skillfully. He saw active service in the various theatres of the War and attended the many conferences subsequent to the War. He brought all his talents to play on the numerous problems which he met. The horrors of Nazism in Germany were indelibly stamped on his memory. Although he was not a Zionist, nor even a devout Jew, his sympathy with the Jewish race and the suffering which it had undergone knew no bounds.

When the leaders of Israel searched for an individual with military background who could be of assistance for the preservation of the community against outside attacks, "Mickey" Marcus was available. His brilliant future in the City of New York was postponed, also forever. He journeyed to Israel, under the assumed name of Michael Stone, and found the community ill-prepared to stand off organized attacks. He found a fighting spirit which in some way overcame the lack of the proper tools. As a realist he set about organizing an army which could cope with the various aggressors. How well he accomplished this chore is detailed in the book. He whipped green but willing troops into a fighting army and built roads and brought in supplies. His energy was boundless and his good humor, infectious. He worked constantly, never sparing himself. He returned to the United States but could not stay. He had to return to complete the job. Again he left assured success.

"Mickey" Marcus saw his efforts brought to fruition before his untimely and accidental death. Before he met his doom he was placed in command of the Jerusalem front as a Brigadier General, thus becoming the first Jewish soldier to hold that rank in Palestine since the immortal Judas Maccabeus. He was the first General of the armies of Israel in 2,000 years. He was buried at West Point, the only soldier there interred who was killed fighting under a foreign flag.

His was a turbulent life and a rewarding one. He must have had the satisfaction of knowing that not only were his efforts appreciated by the inhabitants of Israel but that his feeling of justice had conquered. Truly he was a soldier for all humanity.

Cast A Giant Shadow is a faithful presentation of his life. It is well written and discloses facets which were previously unknown, except to a few intimates. It is well worth reading, not only because it gives a detailed account of the troubled days of the State of Israel but also because it tells what an idealistic man did because he believed in Justice. In these days when so much emphasis is placed on material success it is refreshing and thought arresting to learn about a man who lived in order to vindicate his personal beliefs.

RAPHAEL P. KOENIG

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT

Price Discrimination Under The Robinson-Patman Act. By Frederick M. Rowe. (Little, Brown and Company, Boston, Mass. and Toronto, Ont. The Trade Regulation Series, 1962. $22.50.)

This valuable study should be near at hand to every practitioner who is likely to be called upon to interpret the "infelicitous language" of the Robinson-Patman Act. It is a model of organization, historical research, and penetrating analysis. Especially helpful is the Table of Cases which cites specific page references to the discussion, both general and comprehensive, in the main text.

The Appendix sets forth the legislative history of the Robinson-Patman Act, including the forerunner bills and the House, Senate and Conference Reports. After a point-by-point discussion of the jurisdictional requirements of the Act, the author reviews the various elements of a price discrimination and the defenses thereto. Understandably, this is the core of the study. Included is an analysis of the vexatious question of "Third Line" competitive injury, and, of cost justification, which has proved "complex and frustrating in practice" (p. 266). Chapter 9, which presents an exhaustive treatment of the "good faith meeting of competitor's price," also discusses the legislative efforts to "curtail" this defense. Among the opponents of such efforts, it may be noted, are the Department of Commerce and the Anti-Trust Division of the Department of Justice (p. 256).

No less thorough is the discussion of Sections 2 (c), (d) and (e), and by the time the author finishes his analysis of the criminal liabilities under Section 3, there will be few dissents to his recommendation that "Section 3 today is a legal derelict deserving merciful demise" (p. 474).

Currently, the most important problem of interpretation would seem to be the buyer's liability for discrimination not under Robinson-Patman but under Section 5 of the Federal Trade Commission Act. Section 2 (f) of Robinson-Patman, which declares it unlawful for a buyer "knowingly to induce or receive a (prohibited) discrimination in price" has, with minor, limited exceptions, rarely been invoked. However, this year the Second Circuit Court of Appeals upheld the Federal Trade Commission in its contention that Congress, through an "oversight," failed to include within Section 2 (f) the knowing receipt by buyers of disproportionate promotional allowances. Furthermore, said the Court, even though such a practice is not "expressly proscribed" by Section 2 (d) (which covers sellers not buyers), it is an unfair method of competition within Section 5 of the Federal Trade Commission Act. To quote the Second Circuit, this is a "novelty," and, to quote the author, "the Section 5 controversy is ripe for final resolution by the Supreme Court" (p. 435).

To complete the picture, Chapter 16 deals with investigation, hearings, pleadings, the scope of cease and desist orders, and private suits. Finally, in perspective (Chapter 17), we learn that enforcement against the "big buyer," primary target of the Act, "was never impressive" (p. 541), citing the facts and figures.

Robinson-Patman is "here to stay" (p. 551) but if this "extremely poorly drafted statute" (p. xiii, quoting Dean Landis) is to be revised, Congress could find no better starting point than this study.

DANIEL J. AHEARN, JR.

ANALYSIS OF MALPRACTICE LAW

Malpractice Law Dissected for Quick Grasping. By Charles L. Cuaumano. A handbook for the medical practitioner to combat actions for damages. (Medicine-Law Press, Inc., New York, N. Y., 125 pp.)

Here is a treatise which could be a boon to lawyers if its statements of legal principles were buttressed with more annotations. However, in the final analysis, this work is manifestly a guide for practicing physicians and surgeons to prevent and to protect themselves against malpractice actions. It furnishes instructions and recommends further reading of another work, by the same author on "how witnesses can prepare themselves to testify effectively."

The author speaks with clarity, repetitiveness and an air of infallibility some of which seems to be well justified.

As the author acknowledges, malpractice is just another portion of the field of negligence charged to physicians. The author claims that "The law as discussed in this book is generally followed throughout the country."

It appears that the following are the plaintiff's burdens in establishing a malpractice case:

1. The physician-patient relationship.
2. Defendant's breach of duty.
3. Causal relation between breach and resulting injury.
4. Injury and damages.
5. In some states freedom from contributory negligence and service of preliminary notice on the defendant.

The author points to the 1898 decision of the New York Court of Appeals in *Pike* v. *Honsinger*, 155 N. Y. 201, as the hornbook on the subject of malpractice with respect to the duties of the physician toward the patient in diagnosis and treatment. The opinion states that "The law relating to malpractice is simple and well settled, although not always easy of application." Nothing could be truer.

Some of the admonitions contained in this guide would require the physician to counterbalance his services with papers, waivers and consents for the patients' signature. We simply wonder what would happen to a patient's confidence if he were confronted with a request for a signature during each step of the diagnosis and treatment. After reading this product of considerable research and labor, one can recognize the tremendous hazards which an active physician must invite. The physician risks his fortune, reputation and license to practice under what would appear to be the most innocuous circumstances.

While this book appears to have been written chiefly for the benefit of the practicing physician, it can be read with profit and understanding by the practicing attorney. It will help the specialists and the neophytes.

This is a work which is splendidly indexed and contains an extensive bibliography. It should be useful in lawyers' and physicians offices, for the author deserves their attention and gratitude, since, for the latter, it furnishes a splendid point or place of beginning.

JAC M. WOLFF

Lawyers Guide to Current Thought
As culled from the Periodicals

WILLS

Symposium on Decedent Estates: Restrictions on Testamentary Gifts to Charities in New York. By Joseph T. Arenson. New York Law Forum. 8:359-384: 385-401. August. 1962.

The first of these articles is a report of the Proceedings discussing the problems in estate administration practice and procedure and will contests, held on April 28, 1962 at the New York Law School.

The moderator of this session, Professor Joseph T. Arenson, presented a series of questions to the distinguished Panelists of Surrogates of Nassau, New York and Bronx Counties, who gave their learned and experienced responses. The practising lawyer and the Bar in general will find a reading of this Question-and-Answer documentary matter pertaining to the New York Decedent Estate Law, both stimulating and helpful in understanding and interpreting provisions of the Law.

The companion article in this current issue of the New York Law Forum, Volume 8, pages 385-401, is a contribution of Professor Joseph T. Arenson entitled "Restrictions on Testamentary Gifts to Charities in New York" wherein is reviewed the "Evolution and Judicial Interpretation of Section 17 of the Decedent Estate Law." This study and critical examination of section 17 of the D. E. L. raises questions concerning its social desirability. The distingaished author of the article reports the problems incident to this section are being studied in depth by the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, who undoubtedly will present considered recommendations.

INSURANCE

The Extension of Insurance Subrogation. By Spencer L. Kimball and Don A. Davis. Michigan Law Review. 60:841-872. May. 1962.

Beginning with an introductory analysis of subrogation, legal or conventional, the writers present the result of their study on (1) Applicability of Legal Subrogation, (2) Reasons for Denying Legal Subrogation, (3) Conventional Subrogation.

The conclusion arrived at by Prof. Kimball and Mr. Davis is that "Legal subrogation ought to be extended by courts considerably beyond the generally assumed range of its application." Following a careful review of the case law, their findings result in the opinion that "the court should act to eliminate a great many of the double recoveries that are now possible where accident and health insurance overlaps with workmen's compensation, claims against solvent tortfeasors, or other sources of compensation."

The authors suggest there may be many problems to which abrogation of subrogation would be a desirable solution and that abrogation requires careful consideration in each separate context.

This article holds particular interest for insurance counsellors; however, the general legal practitioner will find it to be enlightening and helpful.

TRADE REGULATION

Apportionment of Damages and Contribution Among Co-conspirators in Antitrust Treble Damage Actions. By Peter G. Corbett. Fordham Law Review. 31:111-140. October, 1962.

The writer states the "purpose of this article is to show that, as a matter of both law and sound antitrust policy, contribution among co-conspirators in treble damage actions should be allowed whether or not the co-conspirators are joined in the action."

Following an introduction to the topic, Mr. Corbett discusses "Preliminary Considerations" covering (A) Nature of the Liability of Participants in Illegal Combinations, (B) Apportionment of Damages and (C) Contribution Between Defendants.

This is followed by the "Choice of Law" wherein is reviewed (A) Cases in Point and (B) Applicable Law. The author of this article then presents a study of the "Determination of a Rule of Contribution" and sums up with a conclusion that the availability of contribution on a pro rata basis is equitable and should insure a fuller enforcement of the antitrust laws. In his judgment this would not lessen to any degree the punitive effect of treble damage liability.

EDUCATION LAW

Government Aid to Church-Related Schools. By M. C. Slough and Patrick D. McAnany. The University of Kansas Law Review. 11:35-75. October, 1962.

The recent controversial "prayer case" *Engel* vs *Vitale*; 370 U. S. 421-8. Law. ed. 2nd. 601; 82 Supr. Ct. Repr. 1261 (1962) is extensively analyzed in this article and the writers also review the many decisions, federal and state, relating to governmental aid to church-related schools.

Following an historical introduction of the settlement of Spanish soldiers on American soil and the Colonial and Revolutionary conception of school law, there is traced the beginning of the Common School.

Part III, "Relevant Lead Cases," comprises a summary of eight reported decisions.

The paper concludes with a detailed study of the case for and against government aid to church-related schools.

The conclusion arrived at by the contributors of this fine article is that parent and child are entitled to choose a church-related institution and if it meets reasonable educational standards prescribed by the State it is in turn entitled to government aid in the form of matching grants or long term loans, or of scholarships, tuition payments, or tax benefits. They contend this to be constitutional provided the church-related school performs a secular or public function.

LABOR LAW

Professional Education in Industrial and Labor Relations: A Symposium. Industrial and Labor Relations Review. 16:3-121. October, 1962.

A series of seven papers by experienced specialists in the field of labor relations.

Mr. Malcolm L. Denise, a lawyer and vice-president of the Ford Motor Company, writes of the role of the personnel manager in a business enterprise. The second paper written by Mr. Russell Allen, education director of the Industrial Union Dept., AFL-CIO, reviews the position of intellectuals and professionals in a changing labor movement.

The third contribution is a paper by Prof. Russell A. Smith and Miss Doris B. McLaughlin discussing "Public Em-

GUIDE TO PERIODICALS

ployment: A Neglected Area of Research and Training in Labor Relations."

Also part of this symposium are an article on the "Expected Ability to Pay and Interindustry Wage Structure in Manufacturing" by Prof. David G. Brown; a study by Prof. Arthur M. Ross on "Prosperity and Labor Relations in Western Europe: Italy and France" and a report by Prof. Subbiah Kannappan on "The Gandhian Model of Unionism in a Developing Economy: The TLA in India."

The concluding paper by Prof. Norman J. Simler on "The Economics of Featherbedding" is an analysis of the economic aspects of featherbedding under conditions of monopoly and competition in the product market.

This symposium raises more problems than it settles but presents views on how to examine them, methodologically and institutionally.

NEGLIGENCE

Personal Injury Claims—Crosscurrents. A symposium on doing justice in personal injury cases. The University of Illinois Law Forum. Volume 1962, Summer, No. 2.

This entire issue is devoted to a review of our present substantive and procedural law regarding doing justice in personal injury cases.

The learned and experienced writers of the six articles contribute their views and suggest remedies such as abolition of the jury in personal injury cases, introduction of a compulsory arbitration system, introduction of a system of compensation in fixed amounts without regard to fault and other proposals.

The studies cover the Problem of Delay in the Courts, the Jury's Role, the Judge's Role, Doing Scientific Justice, Arbitration as a Supplement to Judicial Proceedings, and Compensation Plans for Personal Injuries.

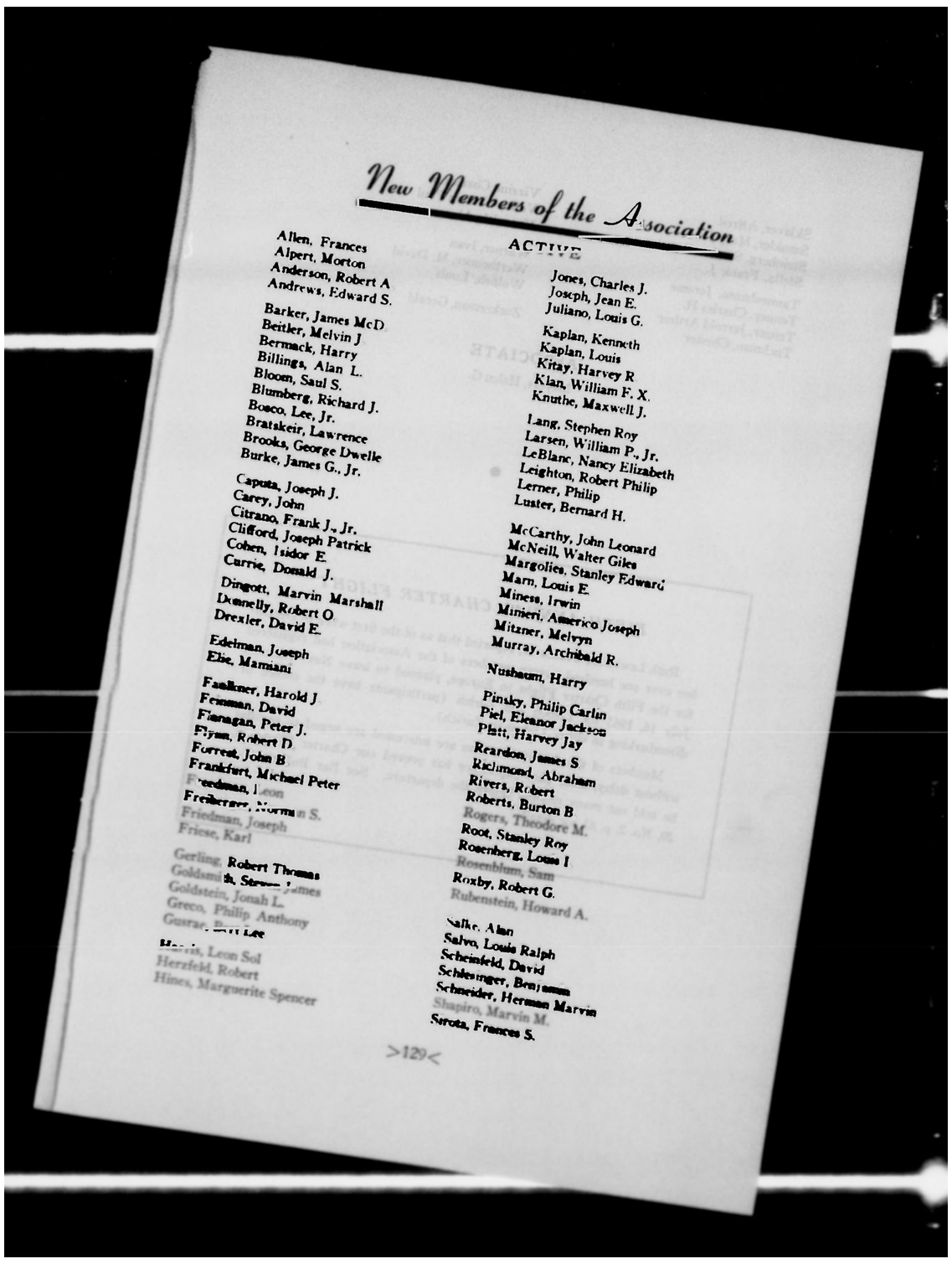
Trial attorneys are concerned about the deficiencies in the current system: however, there will be no accord or general acceptance of the proposals made by the authors of these papers. In fact, the contributors to this symposium are not in complete agreement on the nature of the problems, their causes, or the necessary remedies.

NEWS OF COMMITTEES (continued from page 116)

COMMITTEE ON TAXATION

All members of the Bar, whether or not members of the New York County Lawyers' Association, and other interested persons, are invited to attend Committee on Taxation Luncheon Lectures and Discussions to be held at the New York University Club, 123 West 43 St., New York City, 12:00 Noon to 2:00 P. M. on January 15, February 19 and March 19, 1963.

Reservations should be made in advance by check, in the amount of $5.75 for each Luncheon Lecture, sent to Charles Meyer, Esq., 60 Wall St., New York 5, N. Y. (Checks should be made payable to Charles Meyer.)



New Members of the Association

ACTIVE

Allen, Frances
Alpert, Morton
Anderson, Robert A
Andrews, Edward S.

Barker, James McD
Beitler, Melvin J
Bermack, Harry
Billings, Alan L.
Bloom, Saul S.
Blumberg, Richard J.
Bosco, Lee, Jr.
Bratskeir, Lawrence
Brooks, George Dwelle
Burke, James G., Jr.

Caputa, Joseph J.
Carey, John
Citrano, Frank J., Jr.
Clifford, Joseph Patrick
Cohen, Isidor E.
Carrie, Donald J.

Dingott, Marvin Marshall
Donnelly, Robert O.
Drexler, David E.

Edelman, Joseph
Elie, Marmani

Faulkner, Harold J
Feinman, David
Finnegan, Peter J.
Flynn, Robert D
Forrest, John B
Frankfurt, Michael Peter
Freedman, Leon
Freiberger, Norman S.
Friedman, Joseph
Friese, Karl

Gerling, Robert Thomas
Goldsmith, Steven James
Goldstein, Jonah L.
Greco, Philip Anthony
Gusrae, Kent Lee

Harris, Leon Sol
Herzfeld, Robert
Hines, Marguerite Spencer

Jones, Charles J.
Joseph, Jean E.
Juliano, Louis G.

Kaplan, Kenneth
Kaplan, Louis
Kitay, Harvey R
Klan, William F. X.
Knuthe, Maxwell J.

Lang, Stephen Roy
Larsen, William P., Jr.
LeBlanc, Nancy Elizabeth
Leighton, Robert Philip
Lerner, Philip
Luster, Bernard H.

McCarthy, John Leonard
McNeill, Walter Giles
Margolies, Stanley Edward
Marn, Louis E.
Miness, Irwin
Minieri, Americo Joseph
Mitzner, Melvyn
Murray, Archibald R.

Nusbaum, Harry

Pinsky, Philip Carlin
Piel, Eleanor Jackson
Platt, Harvey Jay
Reardon, James S
Richmond, Abraham
Rivers, Robert
Roberts, Burton B
Rogers, Theodore M.
Root, Stanley Roy
Rosenberg, Louis I
Rosenblum, Sam
Roxby, Robert G.
Rubenstein, Howard A.

Salke, Alan
Salvo, Louis Ralph
Scheinfeld, David
Schlesinger, Benjamin
Schneider, Herman Marvin
Shapiro, Marvin M.
Sirota, Frances S.

Sklaver, Alfred
Smukler, Mary Jane
Steinberg, Stephen Robert
Stella, Frank J.
Tannenbaum, Jerome
Tenney, Charles H.
Tenzer, Jerrold Arthur
Tuchman, Chester
Vizzini, Charles S.
Volm, William Paul
Vuerneck, Alan
Warner, Ivan
Wertheimer, M. David
Wolfish, Louis
Zuckerman, Gerald

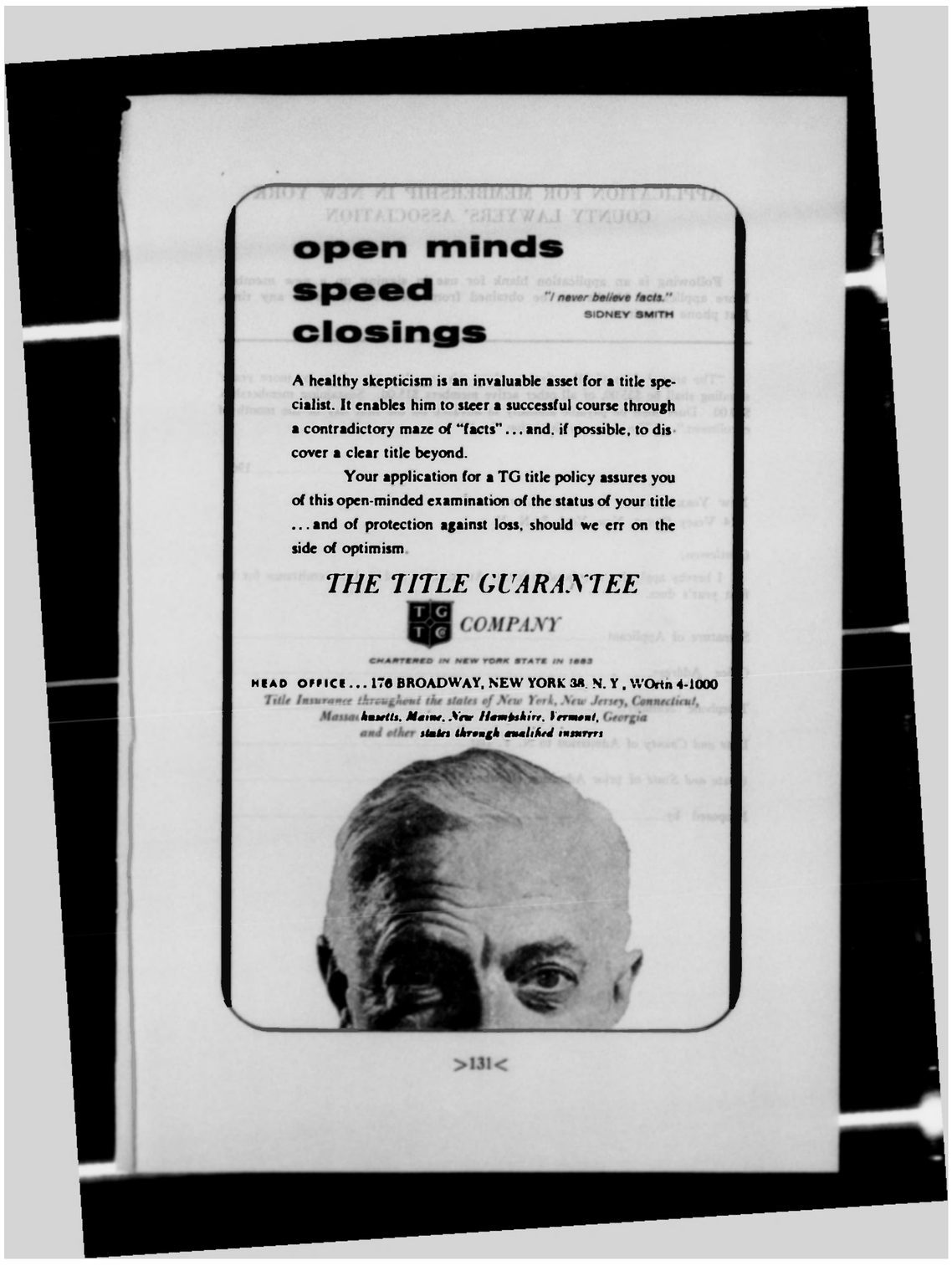
ASSOCIATE

Meyers, Helen G

FIFTH ANNUAL CHARTER FLIGHT

Ruth Lewinson, Treasurer, reported that as of the first week in December over one hundred twenty members of the Association had registered for the Fifth Charter Flight to Europe, planned to leave New York on July 16, 1963 for Lisbon and Zurich (participants have the choice of disembarking in either Lisbon or Zurich).

Members of the Association who are interested are urged to register without delay, since past experience has proved our Charter Flights to be sold out many months before the departure. See Bar Bulletin Vol. 25, No. 2, p. 95 for details.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>131<

APPLICATION FOR MEMBERSHIP IN NEW YORK COUNTY LAWYERS' ASSOCIATION

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"The annual dues of all active members who are lawyers of ten or more years' standing shall be $35.00, of all other active members $15.00. Sustaining membership, $50.00. Dues shall be payable annually in advance on the first day of the month of enrollment." (There is no initiation fee.)

.....196

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street, New York 7, N. Y.

Gentlemen:

I hereby apply for membership in the Association, and enclose remittance for the first year's dues.

Signature of Applicant .....

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(Date *and State* of prior Admission elsewhere) .....

Proposed by .....

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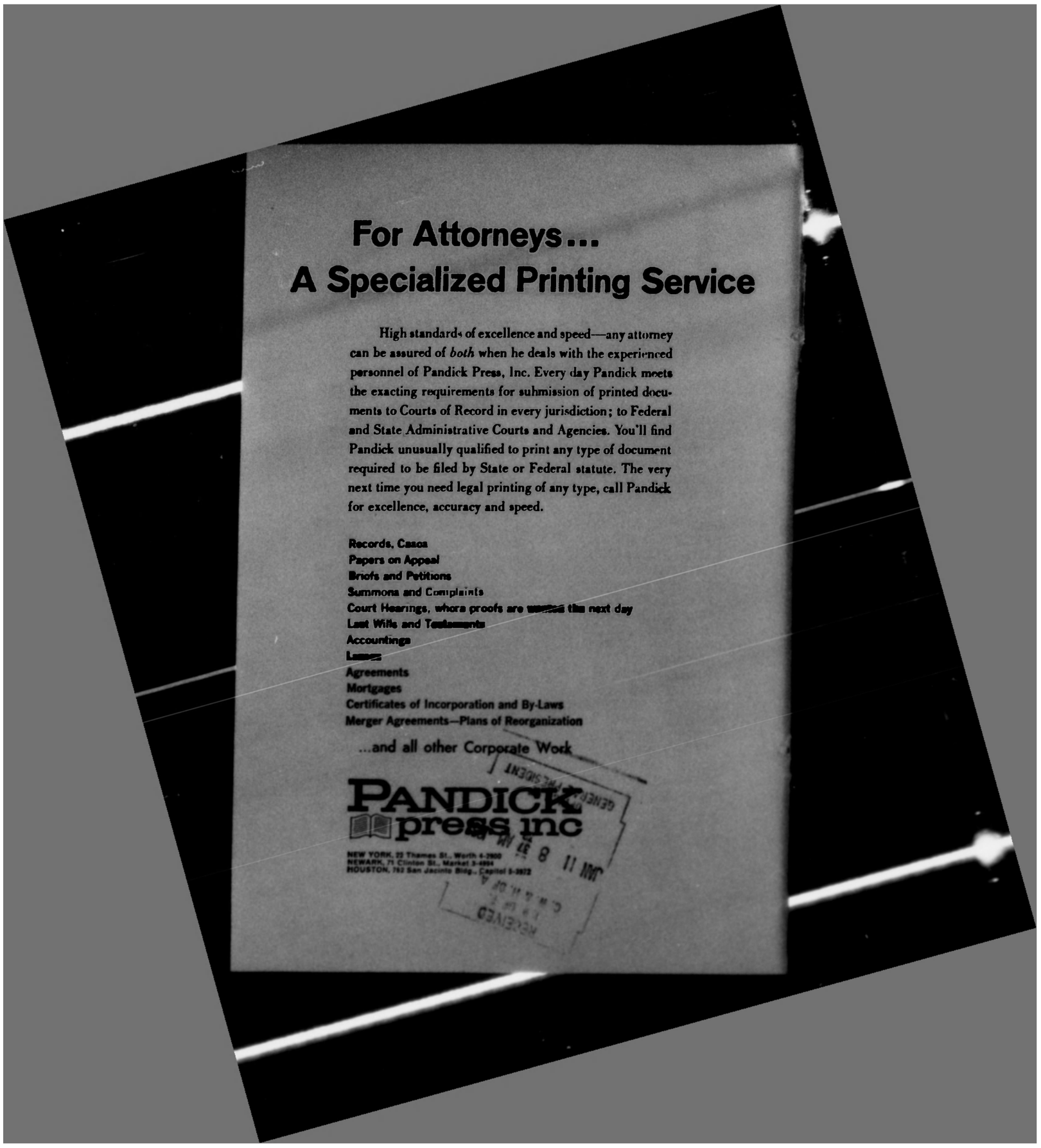
(DEATHS REPORTED SINCE THE SEPTEMBER-OCTOBER, 1962 ISSUE OF THE BAR BULLETIN)

	Died
CALDERWOOD, JOHN N.	September 22, 1962
CHASAN, JACOB	March 17, 1962
DUDGEON, ROBERT S.	September 3, 1962
ERNST, ARTHUR O.	October 13, 1962
FEIERMAN, ALEXANDER	October, 1962
GOULD, ARTHUR L.	April 23, 1962
GREENBERG, EMANUEL	October 4, 1962
HALPERN, MURRAY L.	December, 1961
HAYS, MORTIMER	September 30, 1962
HEGARTY, WILLIAM	December 27, 1961
HELLMOLD, HEINZ A.	February, 1962
KAHN, ALEXANDER	March 11, 1962
KATZ, WILLIAM	September 30, 1962
KUZMIER, ROBERT X.	November 2, 1962
LEVINE, SIDNEY S.	September 17, 1962
LISINSKY, HAROLD	February 13, 1962
MENSCHEL, BENJAMIN	October 5, 1962
MOLLISON, IRVIN C.	May 5, 1962
ORLEANS, ILO	September 26, 1962
PADWE, FRANK	September 10, 1962
PARISH, EDWARD C.	November 5, 1962
ROBERTS, BERTRAM L.	September, 1962
ROHLEHR, JOHN A.	November 9, 1962
SCHUB, SAMUEL	June 15, 1962
STEIN, JOSEPH I.	January 2, 1962
STONE, LOUIS	May 1, 1962
SUSSMAN, ALBERT L.	October 25, 1962
WASSERMAN, LUCIUS P.	September 23, 1962
WELLS, EDWARD D.	September 22, 1962
WHITESIDE, GEORGE W.	October 30, 1962
ZUCKERMAN, WILLIAM	March, 1962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WILLIAM GOFFEN
COUNSELOR AT LAW

RECTOR 2-9478

160 BROADWAY. NEW YORK 38. N.Y.

January 9, 1963

Mr. James R. Hoffa
General President
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington 1, D.C.

Dear Mr. Hoffa:

I know you will enjoy my article on Judicial Review.

I heard you on television on the subject of the Attorney General. What you said concerning his trial experience and his vindictiveness took courage and needed saying.

Best wishes.

Sincerely,

Bill

WG:sn
Enc.

WILLIAM GOFFEN

ADMINISTRATIVE FILE
Goffen, William

WILLIAM GOFFEN
COUNSELOR AT LAW

160 BROADWAY. NEW YORK 38. N. Y.
RECTOR 2-5478

January 5, 1962

Mr. James R. Hoffa
General President
International Brotherhood of Teamsters
25 Louisiana Avenue
Washington, D.C.

Dear Mr. Hoffa:

I intend to submit my article entitled, "Suggestions for Improvement of the Procedure for Discretionary Judicial Review", to the New York University Law Review. A draft is enclosed.

I hope you will enjoy reading it.

Best wishes for the new year.

Sincerely,

William Goffen

WG:sk
Enc.

WILLIAM GOFFEN

Suggestions for Improvement of the Procedure for Discretionary Judicial Review

by William Goffen

Submitted to Prof. Milton D. Green in connection with the seminar on Judicial Administration.

A consideration of San Soucie against Lette[1] and O'Neill against Schechter[2] suggests three areas for improvement of the discretionary judicial review procedure. I have selected these particular cases to illustrate my contentions because of intimate familiarity with them acquired as attorney for the petitioners.

The background of the San Soucie case was the action of Cunningham against Hagitah[3] which sought to enjoin James R. Hoffa and the other officers of the International Brotherhood of Teamsters from assuming the offices to which they were elected at the October, 1957 convention of the International Brotherhood of Teamsters on the ground that the convention was conducted "in a fraudulent, rigged and disgraceful manner"[4]. The Cunningham case was settled after the plaintiffs rested without any evidence being submitted by the defendants. The terms of settlement provided for the creation of a three member Board of Monitors with recommendatory authority concerning the affairs of the union. Hoffa and the other officers were to assume office provisionally pending the outcome of a new election to be called after the expiration of one year. The new election was to be conducted with such guarentees of the democratic process as the secret ballot, under the supervision of the Honest Ballot Association, with the recommendations of the Monitors. After the new election, the Board of Monitors was to be dissolved.

A new convention was accordingly scheduled for February, 1959, one year after the stipulation of settlement. The Monitors, facing termination of their lucrative posts[5], petitioned Judge Lette who had presided over the Cunningham trial to enjoin the new election. Judge Lette fully obliged going so far as to substitute a new order for the settlement order. The new order, entered on February 9, 1959, postponed

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[1]Supreme Court of the United States, October Term 1959, No. 194
[2]5 N.Y. (2nd) 548
[3]Civil Action No. 2881-57, United States District Court for the District of Columbia
[4]Cunningham complaint, paragraph 55
[5]Daniel B. Maher, a former monitor, in testimony before the Committee on the Judiciary of the House of Representatives on May 19, 1960, stated that the cost of the monitorship from January 31, 1958 to March 18, 1960, in Monitors' fees alone was $1,211,888.88.

a new election with its concomitant dissolution of the Board of Monitors until such time as the Monitors should themselves recommend, the exact time to be determined by Judge Letts.

The San Soucie proceeding was soon thereafter instituted in the United States Court of Appeals for the District of Columbia Circuit[6] for a writ of prohibition to prohibit Judge Letts from interfering with the civil right of the members of the Teamsters Union to a free election of their officers. It was urged that Judge Letts had no jurisdiction to substitute a new order for the order of settlement.[7] By order dated April 30, 1959, the Court of Appeals denied without opinion leave to file the petition. Thereupon a petition was filed in the Supreme Court of the United States for a writ of certiorari[8] It was contended that there can be no doubt of the extraordinary national and legal importance of a petition by 30,000 union members to prohibit judicial deprivation of their right and that of a membership of 1,800,000 to an honest, free and democratic election of their international officers. The denial for an indefinite period of this right, under the guise of modification of a consent order, was termed a patent deprivation "of life, liberty, or property, without due process of law".[9] Judge Letts' determination was demonstrated to be an anomaly in the law through citation of numerous court precedents establishing that the judiciary theretofor had consistently supported free elections.[10] As Professor Clyde W. Summers stated:

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[6] No. 18,078/1959

[7] See United States v. Swift & Co., 288 U.S. 106 (1932)

[8] October Term, 1959, No. 194

[9] Constitution of the United States, Amendment 5

[10] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937);
System Federation No. 40 v. Virginian Ry. Co;, 11 F. Supp. 321, aff'd 84 F. 2d 341, aff'd 300 U.S. 315 (1937);
Myers v. Louisiana & A. Ry. Co., 7 F. Supp. 92, 97 (1933);
Malloy v. Carrol, 272 Mass. 324 (1930);
Webster v. Rankins (Mo. App.), 30 S.W. 2d 748 (1932);
Robinson v. Nich, 238 Mo. App. 481 (1940);
Harris v. Geier, 112 N.J. Eq. 99, 103 (1932);
Local No. 11 v. McKee, 114 N.J. Eq. 588 (1933);
Collins v. International Alliance of Theatrical Stage Employees, 119 N.J. Eq. 280, 247 (1935); (continued)

"The right to free and honest elections has been given more clear-cut recognition and more consistent protection. In a number of cases the courts have ordered unions to hold elections when they had been repeatedly postponed and in others, the courts have inquired into the honesty of elections or voided them because they have been improperly conducted. In more extreme cases the courts have appointed receivers to take over the affairs of the union, hold an election under the supervision of the court, and installed the elected officers. Judicial action can be obtained when there is clear showing of need, but in those cases the courts act directly to insure free and honest elections".[11]

It was stressed that the Court of Appeals had "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision".[12] However, the Supreme Court denied the petition without opinion and similarly denied without opinion a petition for rehearing.[13] Consequently, no new, free election of officers of the Teamsters Union was held until July 3, 1961, almost 3 1/3 years later than the

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[10]Continued -
Local No. 878 v. International Association, 180 N. J. Eq. 280 (1936);
Caufield v. Morsechi, (N. Y.), 188 Misc. 195, aff'd 288 App. Div. 84, aff'd 884 N. Y. 888 (1948);
Daley v. Stichel, (N. Y.), 8 App. Div. 2d 887, 8 App. Div. 2d 1(1958);
Dusieg v. Nusso, (N. Y.), 177 Misc. 35, Mod. 263 App. Div. 59 (1941);
Dueing v. Nusso, (N. Y.), 178 Misc. 985 (1943);
Bertucci v. United Cement Masons' Union(N. Y.), 139 Misc. 703 (1931);
Irwin v. Poeschl, (N. Y.), 143 Misc. 858 (1938);
Koubly v. Canavac, (N. Y.), 154 Misc. 343 (1935);
Raevsky v. Upholsterers' International Union, 38 Pa. Dist. & Co. 187 (1940);
Ray v. Brotherhood of Railroad Trainmen, 122 Wash. 39 (1935).

[11]Summers, Democracy in Labor Unions, a report approved by the American Civil Liberties Union on April 26, 1953. See also Summers, Judicial Settlement of Internal Union Disputes, 7 Buffalo Law Review 405 (1958); Judicial Intervention in Revolts against Labor Union Leaders, 51 Yale Law Journal, 1378; Election Disputes within Trade Unions, 88 University of Pa., Law Review 888; 87 C. J. S. Trade Unions, § 23.

[12]Rule 19 of Rules of the Supreme Court of the United States.

[13]Coffen, Monitors v. the Teamsters, The Nation, April 9, 1960.

stipulation of settlement authorized, and then only after a bill had been introduced in Congress to oust the Court of jurisdiction to appoint a union monitorship.[14]

Denial of certiorari without the expression of any reason remains the general practice of the Supreme Court.[15]

Prior to 1925 when far more categories of cases were appealed to the Supreme Court as of right, it seemed that the Court was overwhelmed by the number of appeals.

"The effect which a permissive appeal procedure in a tri-level judiciary can have in controlling the docket of the highest court is nowhere more graphically portrayed than in the experience of the U.S. Supreme Court. While certiorari had been in use, in certain types of cases, since 1891, it was not until the 1925 amendment to the judicial code that certiorari became the dominant method of obtaining a review by that court.

"Associate Justice Harold H. Burton tells us that in 1924, without an order for advancement, it still required a year to reach a case in the docket of the Supreme Court. He then goes on to say:

> 'The act of 1925 had the hoped-for results. From the time its full effect was felt, the court has been current with its business.'[16]

While it is thus apparent that the extension of the certiorari procedure has enabled the Supreme Court to keep current, one sometimes wonders what motivates the Court in granting or denying certiorari. Indeed, the 30,000 members comprising the petitioner, the Indiana Conference of Teamsters, in the San Soucie case and the 1,800,000 membership of the International Brotherhood of Teamsters could not be persuaded of the justice of denial of review in the San Soucie case. The nation's press

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[14] H. R. 11948.
[15] Robertson, Jurisdiction of the Supreme Court, Section 318, 1951.
[16] Hamley, Selecting Cases for Appellate Review, Page 9, Institute of Judicial Administration, 1955, paper presented at the Appellate Judges seminar held at the New York University Law School, July 19 to August 2, 1955.

suggested that denial was due to the impossibility of a democratic election without a "house cleaning" of the union.[17]

However, as was pointed out in the petition for rehearing, both the Honest Ballot Association and the Election Institute gave assurances that a free election by the Teamsters Union could be had after six months of preparation and no amount of rationalization can justify the years of preparation taken by the monitors.

The query is suggested by the history of the San Soucie case whether the administration of appellate justice would be improved by a requirement that the Supreme Court state its reason for denial of certiorari. The advantage as a guide to the Bar of even a one sentence reason for denial of certiorari is obvious and as each petition receives the individual attention of the Justices of the Court anyway, not much additional time would be consumed. It is recommended that the Judicial Code be amended accordingly.

Further queries and recommendations are suggested by the events of O'Neill against Schechter, supra. This was an Article 78 Proceeding instituted in the Supreme Court of New York County on behalf of 58 patrolmen seeking judicial review of the official answers to ten of the multiple choice questions on a civil service examination for promotion to sergeant in the Police Department. The petition was returnable October 14, 1957. The Civil Service Commission moved to dismiss it on the novel ground that the four months' Statute of Limitations expired during a period that the Commission made judicial review impossible by refusing to permit the petitioners to compare their answers with the key answers. Mr. Justice Arthur Markewich denied the motion on January 21, 1958 and gave the respondents until February 7, 1958 to serve their answer and supporting affidavits, with a week thereafter for the reply. Despite the expert authority cited in the petition in support of petitioners' contention that the official answers

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[17]Thus the New York Mirror, October 13, 1959, reported: "In the appeal, the Teamsters Union contended the consent decree provided for a convention any time after one year. The Monitors said obstructive tactics by Hoffa prevented them from preparing for a clean convention and election. Latta held conditions justified delaying the convention and he was upheld by the U.S. Court of Appeals here."

were wrong,[18] the respondents omitted to support by affidavit their choice of answers. The petitioners' reply gave detailed proof by affidavit of experts and quotations from authoritative books that petitioners' contentions were correct and pointed out that the issue of the Statute of Limitations was res judicata. However, Special Term reversed itself and this time sustained the defense of the Statute of Limitations, by order dated April 1, 1958. The Appellate Division unanimously affirmed and unanimously denied leave to reargue and to appeal to the Court of Appeals. However, the Court of Appeals granted leave to appeal and on April 16, 1959, reversed the order of the Appellate Division and remitted the matter to Special Term.

All evidentiary matter and pleadings required by Article 78 had been served and the complete record was before the Court of Appeals. Judge Froessel who wrote the majority opinion in the O'Neill case on the argument of the appeal observed that the Court could not dispose of the entire matter. Under the state constitution, it could not do so because it has no original jurisdiction[19] and Special Term had not theretofore passed upon the propriety of the answers. "The Court has no original jurisdiction; all its business is appellate business".[20]

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[18]Typical of the questions sub judice were questions 87 and 88 the official answers to which were as follows:

"87. According to the Manual of Procedure, a summons Card(U. F. 4a) will not be prepared by a member of the force issuing a summons for:

(d) operating a motor vehicle while intoxicated."

"88. According to the Penal Law, the one of the following threats which is not common to commission of the crimes of extortion and blackmail is a threat to some one to:

(d) kidnap him or a member of his family."

As the Manual of Procedure, Article 31, Paragraph 3, prohibits service of a summons in lieu of arrest upon a person when the offender is unable to take care of himself, by reason of injury or intoxication, the official answer to Question 87 was wrong. The official answer to Question 88 was also wrong in its assumption that a threat to kidnap could not be common to extortion and blackmail under the Penal Law, sections 861, 852 and 858.

[19]Constitution, Art. VI, Sec. 7 Court

[20]Cohen, Powers of the New York Board of Appeals, Page 4, 1958.

In Matter of Carothers,[21] the Court observed: "Since neither the constitution nor the Civil and Criminal Codes give the Court any original jurisdiction, no relief can be permitted on an application for an order to permit an attorney who had been duly admitted to practice to file in the Clerk's Office, an oath nunc pro tunc under the laws requiring it to be done before a specified date."

See also the Matter of Boole against Martin.[22]

Of course, as Justice Breitel observed at a session of Professor Green's seminar held on December 6, 1961, if the Appellate Division in a case like the O'Neill case had chosen to reverse the dismissal for the Statute of Limitations, with the complete record before it, it could have made a final disposition of the matter on the merits, something the Court of Appeals did not have the power to do. The Appellate Division, being a branch of the Supreme Court, has unlimited original as well as appellate jurisdiction.

At a session of Professor Green's seminar on judicial administration held on November 1, 1961, Chief Justice Weintraub stated that the New Jersey Supreme Court in a case like the O'Neill proceeding would have original jurisdiction in its discretion to make a complete determination without the need to remit the matter to the initial court. The Constitution of the State of New Jersey,[23] provides the necessary jurisdiction as follows:

> "The Supreme Court... may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."

As events transpired, over three years were necessary for a complete determination of O'Neill v. Schechter. The query is therefor suggested whether the New

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[21] 188 New York 131 (1899)
[22] 285 N.Y. 654.
[23] Article 6, Section 3, Par. 3.

York Court of Appeals should not be granted original jurisdiction comparable to that of the New Jersey Supreme Court to make a full determination in its discretion of any cause under review where the record is complete. It is believed that the merits of empowering the Court of Appeals to make a full determination when a complete record is before it are obvious. As has been well said by the Section of Judicial Administration of the American Bar Association:

"The fact that error has been found does not necessarily mean that a new trial is necessary. Sometimes the record on appeal contains adequate material from which a proper judgment may be formed. Where this is so, the appellate court should enter or direct the entry of such judgment as permitted by Federal practice. (See 28 U.S.C. § 2106) Where the taking of evidence is required only with respect to a separable part of the case, a partial new trial rather than a full new trial should be ordered.'[24]

It is therefore recommended that the Constitution of the State of New York be amended accordingly.

After remittitur by the Court of Appeals, Justice Markewich declined to proceed with the case which was instead heard by Mr. Justice Henry Clay Greenberg. On October 27, 1959, Justice Greenberg related that the authorities fully substantiated petitioners' contentions concerning the answers under review but remanded the matter to the Civil Service Commission because "it is not the function of this court to evaluate answers to an examination dealing with technical and highly specialized fields."[25] The Court thereby abdicated its function of judicial supervision of the determinations of administrative agencies.[26]

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[24]The Improvement of the Administration of Justice, 4th Ed., 1961 (p. 87). See also Minimum Standards of Judicial Administration, Edited by Arthur T. Vanderbilt, 1949 (p. 449).

[25]Rule 72 of the New York Rules of Civil Practice provides that the memorandum of opinion is "part of the record on which the order was made."

[26]Meyers, American Legal System, p. 3.

A notice of appeal was served from Justice Greenberg's order which, in petitioners'view, was equivalent to a denial of relief. Ten months later, the Civil Service Commission reported in the City Record of August 17, 1960, the bare statement that no change would be made in the original answers. On January 31, 1961, the Appellate Division refused to review Justice Greenberg's order on the ground that it was interlocutory.[27] It then became necessary to request Justice Greenberg's permission for leave to appeal but he denied this application. The only alternative left for petitioner was to petition all over again to Justice Greenberg. This time he dismissed the petition flatly on May 3, 1961.

It is difficult to understand the rationale of the Appellate Court's determination that the remand to the Civil Service Commission was an intermediate order, in view of Special Term's assertion that it was not the court's function to evaluate answers. In view of the Special Term's conviction that it was not its function to review these answers, its order of remand was as final a denial of judicial relief as an order of dismissal of the petition would have been. Perhaps the Appellate Division confused judicial finality with administrative finality. As stated by Cohen and Karger;[28]

> 'An Article 78 proceeding, on the other hand, is, for at least some purposes, distinct from the administrative proceeding; so that the administrative determination sought to be reviewed may be non-final yet an order made in the Article 78 proceeding finally denying or granting the relief sought therein will be held to be a final order determining the judicial proceeding.'[29]

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[27]The Court cited as authority for its conclusion Matter of American Holding Corporation against Murdock, 6 App. Div. (2d) 596 (1958), although Special Term in that case did not abdicate its function of judicial review. The order of remand in the Murdock case was held intermediate because the agency was required to exercise quasi-judicial as distinguished from ministerial duties.

[28]Powers of the New York Court of Appeals, page 133 (1952).

[29]Matter of Wallacha, Inc. v. Boland, 277 N.Y. 345; Metropolitan Life Insurance Co., v. Boland 281 N.Y. 357; Armstrong v. Corp., Counsel of City of New York; 270 N.Y. 543.

The query is suggested whether the Appellate Court should have authority to reject an appeal upon a technical interpretation of what constitutes a final order upon remand to an administrative agency which has theretofore fully considered the problem.[30]

It is recommended in the interests of justice that the Appellate Court be required to hear appeals even though the orders appealed from remand matters to Administrative agencies.

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[30]In Matter of Rochester Gas & Electric Corp. v. Maltbie, 298 N.Y. 103 (1948), the Court of Appeals dismissed on appeal with leave to apply to the Appellate Division for clarification whether the remand to the agency was final or intermediate.

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ADMINISTRATIVE

Goffen, William (atty.)

March 9, 1961

Mr. William Goffen
Counselor at Law
150 Broadway
New York 38, New York

Dear Mr. Goffen:

I have your letter of March 7th and also your communication with respect to the matter of possible rapprochement between the Teamsters and their Administration. While I appreciate the efforts you are putting forth on this problem, I must reiterate again that I am in no position to authorize any fees or compensation to you for these efforts.

Very truly yours,

H J Gibbons
Executive Assistant to the
General President

HJG:id

March 9, 1961

Mr. William Goffen
Counselor at Law
150 Broadway
New York 38, New York

Dear Mr. Goffen:

I have your letter of March 7th and also your communication with respect to the matter of possible rapprochement between the Teamsters and their Administration. While I appreciate the efforts you are putting forth on this problem, I must reiterate again that I am in no position to authorize any fees or compensation to you for these efforts.

Very truly yours,

H J. Gibbons
Executive Assistant to the
General President

HJG:id

WILLIAM GOFFEN
COUNSELOR AT LAW

RECTOR 2-5478

150 BROADWAY. NEW YORK 38. N.Y

March 7, 1961

Mr. James R. Hoffa
25 Louisiana Avenue, N. W.
Washington 1, D. C.

Dear Mr. Hoffa,

The enclosed photostat of George Rundquist's letter of March 6 is self explanatory.

While I continue my efforts toward rapprochement of the Teamsters and the Administration, perhaps there are other assignments you may have in mind for me.

Sincerely,

Bill

WG:js

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George E. Rundquist
Executive Director
Gordon K. Haskell
Josephine Scheiber
Assistant Directors

March 6, 1961

William Goffen, Esq.
150 Broadway
New York 38, N. Y.

Dear Bill:

It was nice of you to have me for lunch the other day. I enjoyed seeing you again.

Your concern about the continuing monitorship of the Teamsters Union has been resolved so this is one less concern for you to carry.

Cordially,

George E. Rundquist
Executive Director

GER/llj

ADMINISTRATIVE FILE

Goffen, William

X

X RECTOR 2-5478

WILLIAM GOFFEN
COUNSELOR AT LAW

150 BROADWAY, NEW YORK 38, N. Y.

February 2, 1961

Mr. James R. Hoffa
International Brotherhood of Teamsters
25 Louisiana Avenue, N. W.
Washington 1, D. C.

Dear Mr. Hoffa,

The enclosed copies of letters are self-explanatory.

This would be a convenient time for me to move to Washington before I get too involved in the next semester of teaching. Is the position of resident counsel still available? On a full time basis, I know I would be very useful to you. Please tell me the good news promptly.

Best wishes.

Sincerely yours,

William Goffen

February 2, 1961

Mr. Harold J. Gibbons
International Brotherhood of Teamsters
25 Louisiana Avenue, N. W.
Washington 1, D. C.

Dear Mr. Gibbons,

I had a recent luncheon conference with Julius C. C. Edelstein, a close associate of Senator Lehman. We discussed the matter of peace with the Kennedy administration for about an hour, but Julius felt that a prior and prolonged effort should be made for improved public relations for the Teamsters. Also, he feels the question may be adversely complicated by Meany's attitude. Under the present circumstances, he is not desirous of approaching Senator Lehman, but he did offer to arrange an appointment with the Secretary of Labor. Is that worthwhile? Incidentally, Julius wants to be remembered to you.

The enclosed photostat of a letter from Ed Snyder is self explanatory. Notwithstanding Ed's hesitancy about approaching Ralph Dungan personally, I think he will do so and on my next visit to Washington, perhaps I will see Ed with that in mind.

Sincerely,

William Hoffer

COPY

Friends Committee on National Legislation

CHARLES J. DARLINGTON
Chairman, General Committee
36 Seven Avenue
Woodstown, New Jersey

SAMUEL A. LEVERING
Chairman, Executive Council
Arnold Wright

245 SECOND STREET, N. E.
WASHINGTON 2, D. C.
LINCOLN 7-4343

E. RAYMOND WILSON
Executive Secretary

EDWARD F. SNYDER
Legislative Secretary

CHARLES H. HARKER
Administrative Secretary

January 9, 1961

William Goffen
150 Broadway
New York 38, New York

Dear Bill:

Thanks very much for sending along a copy of the opinion in the Seasongood case. I have read it with considerable interest, and am passing along to Chuck Harker and Larry White this information.

I am glad you had an opportunity to see Ralph Dungan when you were here December 2. I was interested to hear that he wound up by saying that perhaps an appointment with Kennedy could be had at a later date. You know from the papers about the President-elect's busy schedule in Palm Beach, New York and Washington. I am enclosing an article from a recent Washington Post telling about how busy Ralph Dungan and his associates have been, too, which I thought you might be interested in seeing.

Our Committee at the Annual Meeting in mid-December, soon after I talked with you, indicated pretty clearly the priorities which they wished the staff to work on, and the fields in which the staff should contact the new Administration. In light of this I have considerable hesitancy about approaching Ralph Dungan personally. In view of the favorable contact which you have had with him, do you think it would be possible for you to follow up with him?

At a program meeting for the Civil Liberties Clearing House Conference last Friday, Tom Harris, AFL-CIO Counsel, told me he expects the Teamster monitorship to be ended "in the next few weeks" since he believes the Court of Appeals won't uphold Judge Letts.

Sincerely yours,

Ed

Edward F. Snyder

EFS/jh
Clipping enclosed